

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 788

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WINTON M. BLOUNT, POSTMASTER GENERAL OF THE  
UNITED STATES, AND EVERETT T. CARPENTER, POST-  
MASTER OF THE CITY OF LOS ANGELES, STATE OF  
CALIFORNIA,

*Appellants,*

—v.—

TONY RIZZI, D/B/A THE MAIL BOX

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No. 812

UNITED STATES OF AMERICA AND THE  
POSTMASTER GENERAL,

*Appellants,*

—v.—

THE BOOK BIN

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ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR  
THE CENTRAL DISTRICT OF CALIFORNIA AND THE NORTHERN  
DISTRICT OF GEORGIA, RESPECTIVELY

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IN THE UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA

No. 69-64-R

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/ 9/69	Fld complt for injnctn and declar relief to restrain the defts from interfering with pltf's mail pur to 39 USC 4006. Issd summs—Md JS-5. Fld memo of pts and authors in support of applic for prelim injnctn and for Three-Judge Court. Fld OSC retnble 1/20/69, 10am why prelim injnctn should not issue etc and TRO.
1/23/69	Fld notification and certificate of Judge Real—re "this challenge requires the formation of a Dist Court of Three Judges, etc. (R)
1/27/69	Hrg on OSC re TRO: Court directs the Government to hold mail presently in their custody. Gov-ernment to prepare order.
*1/20/69	TRO contd in force & effect until 1/27/69, 10am and for fur hrg at that time. Applicn for 3 judge ct not opposed.
1/29/69	Fld Order (R) re preliminary injunction and granting application for 3-Judge court.
2/ 6/69	Fld summs—retd svd as to all defts.
3/11/69	Fld Deft's ANSWER to complt.
3/26/69	Fld & mld notes plcg on cal 4/10/69. 10am for hrg re prelim Injctn by 3-Judge Court, purs to 28 USC 2284.
4/ 2/69	Fld defs memo in oppstn of application for prelim injnctn. (Copies to 3 Judges.

DATE	PROCEEDINGS
4/10/69	Hrg on appl for prelim inj fld 1/9/69 & ord cause stand submitted.
6/10/69	Fld plf's memo opinion & ord. Cpys mld.
6/23/69	LODGED Plf's Proposed findgs of fact & Concls of law. LODGED Plf's Proposed Jdgmnt.
8/ 1/69	Fld finds of fact & concl of law: Fld jdgmnt & ord thereon that deft's, etc vacate ord No. 68-103 of 12/31/68, dlvr to pltf all mail addressed to pltf, etc & refrain from any prcdngs, acts, etc enforcing the provs of 39 USC 4006 agnst pltf. (Ent 8/1/69 ntfld prtys). JS-6
8/13/69	Fld motn for stay of judgment pending appeal; and affid.
8/18/69	Fld plf's oppos to ex parte motn for stay of jdgmnt pendg appeal & motn to require def's to deliver forthwith to pltf all mail addressed to pltf being held by def's & affid. Copies to Judge Carr, Real & mld cpy to Judge Hufstedler.
8/20/69	Fld ORDER Jdgmnt entered 8-1-69, Stayed until 9-10-69, pending Appeal. (CC) (Judge Hufstedler).
9/ 2/69	Fld Deft's NOTICE OF APPEAL, with proof of Service. Cy to (R) (CC) and Judge Hufstedler. Fld deft's Request to Clerk to Certify Record on appeal and provide for its transmission to the Supreme Court.
9/26/69	Fld def's Ex Parte Motn for stay of Jdgmnt Pendg Appeal & affid of Larry L. Dier, Fld Ord (R) staying jdgmnt until becoming final after appeal.

In the United States Supreme Court

- 3/ 2/70 Order of the Supreme Court noting probable jurisdiction and placing case on summary calendar.



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. 69-64-R

TONY RIZZI, doing business as THE MAIL BOX, PLAINTIFF

*vs.*

MARVIN WATSON, Postmaster General of the United States of America; and EVERETT T. CARPENTER, Postmaster of the City of Los Angeles, State of California, DEFENDANTS

COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF  
TO RESTRAIN THE DEFENDANTS FROM INTERFERING  
WITH PLAINTIFF'S MAIL PURSUANT TO 39 U.S.C.  
§ 4006

[Filed Jan. 9, 1969]

\* \* \* \*

PLAINTIFF ALLEGES:

I

The jurisdiction of this Court over this action is invoked under 39 United States Code § 4006, 5 United States Code § 5001 et. seq., and 28 United States Code § 1331.

The matter in controversy exceeds, exclusive of interest or costs, the sum of value of \$10,000.00, and arises under the Constitution and laws of the United States, and particularly under:

- (a) the First Amendment to the United States Constitution;
- (b) the Fifth Amendment to the United States Constitution;
- (c) the Sixth Amendment to the United States Constitution; and
- (d) the Seventh Amendment to the United States Constitution.

## II

The jurisdiction of this Court is further invoked under 28 United States Code §§ 2201, 2202, 2282 and 2284.

## III

Plaintiff TONY RIZZI, doing business as THE MAIL BOX, is engaged in distributing by mail publications, all of which are protected by the free speech and press provisions of the First Amendment to the United States Constitution. None of the publications distributed by him are obscene. His publications do not go substantially beyond customary limits of candor in describing sex or nudity, in the nation as a whole; they do not appeal to the prurient interest of the average person, in the nation as a whole; and they are not utterly without redeeming social importance.

## IV

At all times herein mentioned, defendant MARVIN WATSON was the Postmaster General of the United States of America and defendant EVERETT T. CARPENTER was the Postmaster of the City of North Hollywood, State of California. Defendant Carpenter, in his capacity as Postmaster, is charged with the duties of administering and managing the United States Post Office in and for the said City of North Hollywood, State of California, and is in charge and responsible for the receipt and distribution of materials sent through the United States mails for delivery in and from said City.

## V

On or about December 31, 1968, Peter R. Rosenblatt, Judicial Officer of the Post Office Department, executed Order No. 68-103 addressed to defendant Carpenter herein, instructing said defendant Carpenter to return to the sender all mail addressed to plaintiff (with minor exceptions) with the word "Unlawful" stamped upon the outside of such mail.

## VI

The said Order was based upon a decision of the said Peter R. Rosenblatt dated December 31, 1968, as afore-said, in which he found that the magazines "Me", "Gigi", "Susy", "Match", "Bunny", "Golden Girls" and "Girl Friend" were obscene and were not constitutionally protected expression.

## VII

In finding the said magazines to be obscene, as afore-said, Peter R. Rosenblatt, the Judicial Officer, applied standards which are contrary to those commanded by the First Amendment as the same has been interpreted by the United States Supreme Court and other courts of competent jurisdiction. The Judicial Officer also specifically refused to follow binding decisions of this Court, wherein (a) the Honorable Warren J. Ferguson found a large number of like magazines to be not obscene in *United States v. Three Packages, etc.*, Civil No. 68-25-F; (b) the Honorable Irving Hill found a large number of like magazines to be not obscene in *United States v. 80 Cartons of Magazines, etc.*, Civil No. 68-480-IH; (c) the Honorable Pierson M. Hall found a large number of single photographs to be not obscene in *United States v. Six (6) Parcels, etc.*, Civil No. 66-1129-PH; and (d) the Honorable Manuel L. Real found the publication "Female Photographers" to be not obscene in *United States v. Miller*, Civil Nos. 1842, 2166 and 2396. The Judicial Officer also refused to give any weight to the fact that the Post Office Department had itself granted second class mailing privileges to a large number of comparable magazines.

## VIII

The order of the Judicial Officer is invalid and void for the following reasons:

(a) The finding of the Judicial Officer that the magazines in question are obscene is unsupported by any legal evidence. The Post Office Department witnesses who testified against the magazines involved

herein also testified that they found the magazines which the United States Supreme Court found not obscene in *Felton v. Pensacola*, 390 U.S. 340, 88 S.Ct. 1098, to be "objectionable" in the same respects that they found the magazines involved herein to be "objectionable".

(b) The finding of the Judicial Officer that the magazines in question are obscene is arbitrary, capricious, an abuse of discretion, and not in accordance with law. The magazines involved herein are legally indistinguishable from magazines found not obscene by courts of competent jurisdiction and magazines granted second class mailing privileges by the Post Office Department itself.

(c) The finding of the Judicial Officer that the magazines in question are obscene is based upon the utilization of standards which are directly contrary to those set forth by the United States Supreme Court.

(d) The conclusion by the Judicial Officer that the magazines in question are obscene is contrary to law and unsupported by any legal evidence.

(e) The witnesses upon whom the Judicial Officer relied were not qualified experts.

## IX

Unless injunctive relief is granted by this Court, plaintiff will suffer great and irreparable injury for which he has no adequate remedy at law.

## SECOND CAUSE OF ACTION

### X

Plaintiff reincorporates and realleges Paragraphs I through IX, inclusive, of the first cause of action as though the same were herein fully set forth.

### XI

The statute, 39 United States Code § 4006, on its face and as construed and applied herein, violates rights guar-

anteed to the plaintiff under the free speech and press, due process, equal protection, and jury trial provisions of the First, Fifth, Sixth and Seventh Amendments to the United States Constitution in the following respects:

(a) The statute permits the Post Office Department to impose prior restraint upon the circulation of the press without assuring a judicial determination in an adversary proceeding within a specified brief time limit. The statute provides no assurance of prompt judicial determination, nor does the statute require the Post Office Department to initiate court proceedings justifying the restraint upon the circulation of the press and to bear the burden of proof in such court proceedings.

(b) The statute arbitrarily and capriciously authorizes the Post Office Department, an administrative agency, to suppress material as obscene without the protections of a judicial proceeding, including the right to a jury trial, the presumption that the challenged material is constitutionally protected, the requirement of proof of the essential elements of obscenity, the requirement of proof of scienter, and all of the other protections required in a judicial proceeding before the publications, which are prima facie protected by the guarantees of freedom of speech and press, may be suppressed.

(c) The statute, by reason of the vagueness and ambiguity of its language, the lack of ascertainable standards, the omission of any requirement of scienter, the vesting of unfettered discretion in an administrative agency to suppress speech and press as allegedly obscene, abridges the exercise of freedoms of speech and press and deprives plaintiff of liberty and property without due process of law.

(d) The statute arbitrarily and capriciously authorizes the Post Office Department to engage in invidious discrimination between material which the administrative agency deems obscene for subjective reasons and other comparable material held constitutionally protected by the courts or granted second

class mailing privileges by the Post Office Department itself, and the Post Office Department has engaged in said invidious discrimination with respect to the plaintiff herein and the material involved, all in violation of the due process and equal protection provisions of the Fifth Amendment to the United States Constitution.

## XII

There is a bona fide and genuine dispute between the parties, consisting of the following:

(a) Plaintiff contends that the statute in question, 39 United States Code § 4006, on its face and as construed and applied, violates constitutional guarantees as set forth in Paragraph XI(a), (b), (c) and (d).

(b) Defendants contend that 39 United States Code § 4006 in question is in all respects valid and constitutional and specifically does not violate the constitutional guarantees as set forth in Paragraph XI(a), (b), (c) and (d).

WHEREFORE, Plaintiff prays:

1. That this Court issue a temporary injunction, preliminary injunction, and final injunction, restraining and enjoining defendants and each of them and their agents, servants, employees and attorneys, and all persons in active concert or participating with them, from any threatened proceedings, proceedings, acts, or other conduct, enforcing the provisions of 39 United States Code § 4006 against plaintiff in relation to the books, magazines or advertisements distributed by plaintiff; from in any other manner, directly or indirectly, harassing or threatening plaintiff in the conduct of his business with respect to the sale or distribution of plaintiff's books, magazines and advertisements; and directing the defendants to vacate the order of the Judicial Officer of the Post Office Department (No. 68-103) executed on December 31, 1968; and to forward all mail addressed to plaintiff without interference.

2. That plaintiff have a judgment and decree of this Court declaring his rights and status, and more particularly adjudicating that:

(a) 39 United States Code § 4006, on its face and as construed and applied herein, violates rights guaranteed to the plaintiff under the free speech and press, due process, equal protection, and jury trial provisions of the First, Fifth, Sixth and Seventh Amendments to the United States Constitution;

(b) 39 United States Code § 4006, on its face and as construed and applied, imposes a prior restraint upon the circulation of the press without assuring a prompt judicial determination and without requiring the Post Office Department to initiate court proceedings or to bear the burden of proof in such court proceedings with respect to the alleged non-mailability of the material;

(c) 39 United States Code § 4006, on its face and as construed and applied, arbitrarily and capriciously authorizes the Post Office Department to suppress material as obscene without the protections afforded judicial prosecutions, including the right to a jury trial, the presumption that the challenged material is constitutionally protected, the requirement of proof of the essential elements of obscenity, the requirement of proof of scienter, and all other protections required in judicial proceedings before publications ordinarily protected by the free speech and press provisions of the Constitution may be suppressed;

(d) 39 United States Code § 4006, on its face and as construed and applied, is vague, ambiguous and overbroad, lacks ascertainable standards, omits any requirement of scienter, vests unfettered discretion in an administrative agency to suppress speech and press, all resulting in the abridgment of the exercise of freedoms of speech and press and the deprivation of liberty and property without due process of law;

(e) 39 United States Code § 4006, on its face and as construed and applied, arbitrarily and capriciously

authorizes the Post Office Department to engage in invidious discrimination between constitutionally protected material and comparable material which the Post Office deems obscene for arbitrary and subjective reasons, all contrary to the due process and equal protection provisions of the Fifth Amendment to the United States Constitution;

(f) The magazines distributed by plaintiff are entitled to protection from all governmental infringement by the provisions of the First Amendment to the United States Constitution, that said magazines do not violate the provisions of 18 United States Code §§ 1461 and 1462, nor the provisions of any other federal statute.

3. To convene for the purpose of hearing and determining the application for a preliminary injunction of this cause, a statutory court of three judges, pursuant to the provisions of 28 United States Code § 2282, at least one of whom shall be a circuit judge, in accordance with the provisions of 28 United States Code § 2284.

4. The plaintiff be given all such other, further, and different relief as this Court may deem just.

/s/ Stanley Fleishman  
STANLEY FLEISHMAN  
Attorney for Plaintiff



## VERIFICATION

STATE OF CALIFORNIA       )  
                                   ) SS  
 COUNTY OF LOS ANGELES    )

I am the Plaintiff in the above entitled action; I have read the foregoing COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF TO RESTRAIN THE DEFENDANTS FROM INTERFERING WITH PLAINTIFF'S MAIL PURSUANT TO 39 U.S.C. § 4006 and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I certify that the foregoing is true and correct.

/s/ Tony Rizzi  
 TONY RIZZI

Subscribed and sworn to before me  
 this 7th day of January, 1969

/s/ Aubrey I. Finn  
 AUBREY I. FINN  
 Notary Public in and for said  
 County and State

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

ORDER TO SHOW CAUSE AND TEMPORARY  
RESTRAINING ORDER

[Filed Jan. 9, 1969]

\* \* \*

Upon reading the verified complaint of plaintiff on file herein, and it appearing that defendants are withholding from plaintiff certain mail directed to the plaintiff related to alleged unlawful activity under 39 United States Code § 4006, and it further appearing that the aforesaid mail connected with the alleged unlawful activity will be returned to the senders, and it also appearing that plaintiff's business and goodwill will be greatly and irreparably damaged if he does not receive his mail, and it appearing that the magazines in question may be entitled to constitutional protection, and it appearing that the withholding and return of plaintiff's mail to the senders is causing and will, unless restrained by this Court, continue to cause plaintiff great and irreparable damage and injury, and it further appearing that plaintiff, by his complaint, has raised substantial questions as to the constitutionality of 39 United States Code § 4006 under the First, Fifth, Sixth and Seventh Amendments to the United States Constitution,

IT IS HEREBY ORDERED, JUDGED AND DECREED that defendants appear on the 20th day of January, 1969, at the hour of 10:00 A.M., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Manuel L. Real, United States District Judge, hearing room No. 14, United States Courthouse, 312 North Spring Street, Los Angeles, California, then and there to show cause, if any, why a preliminary injunction should not issue enjoining defendants and each of them and their agents, servants, employees and attorneys,

and all persons in active concert or participating with them,

(1) from any threatened proceedings, proceedings, acts, or other conduct enforcing the provisions of 39 United States Code § 4006 against plaintiff in relation to the books, magazines or advertisements distributed by plaintiff;

(2) from in any other manner, directly or indirectly, harassing or threatening plaintiff in the conduct of his business with respect to the sale or distribution of plaintiff's books, magazines and advertisements;

(3) directing the defendants to vacate the order of the Judicial Officer of the Post Office Department (No. 68-103) executed on December 31, 1968;

(4) to refrain from holding all mail directed to plaintiff related to the alleged unlawful activity and from returning said mail to the senders and to forward all mail to plaintiff without interference;

and further to show cause why the cause herein and plaintiff's motion for a preliminary injunction should not be heard before a three-judge District Court, pursuant to 18 United States Code §§ 2282 and 2284.

IT IS FURTHER ORDERED, JUDGED AND DECREED that pending hearing on the order to show cause, or until the court shall otherwise order, the defendants, their agents, servants, employees and attorneys, and all persons in active concert or participating with them, are enjoined and restrained from returning any mail directed to the plaintiff and now being held by the Post Office Department as related allegedly to the unlawful activities of plaintiff under 39 United States Code § 4006.

IT IS FURTHER ORDERED that this order to show cause, the complaint, and points and authorities be served on the defendants on or before the 9th day of Jan., 1969.

/s/ [Illegible]  
United States District Judge

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

69-64-R

1/20/69

TONY RIZZI, ETC.

vs.

MARVIN WATSON, ETC., ET AL

DOCKET ENTRY

TRO contd in force and effect until 1/27/69 at  
10AM and for fur hrg at that time. Applicn for  
3 jddge ct not opposed. (R)

PRESENT:

HON. MANUEL L. REAL, Judge  
ROBERT T. ERICKSEN  
Deputy Clerk

LEE FEE  
Court Reporter

Attorneys Present for Plaintiffs:  
STANLEY FLEISHMAN for pltf.

Attorneys Present for Defendants:  
LARRY DIER, Assistant U. S. Attorney

PROCEEDINGS:

HEARINGS OSC, fld 1/9/69, why preliminary in-  
junction should not issue & for TRO.

Temporary Restraining Order continued in force and  
effect until January 27, 1969 at 10AM for further hear-  
ing at that time. Application for three judge court not  
opposed.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

ORDER RE: PRELIMINARY INJUNCTION

[Filed Jan. 29, 1969]

This cause came before the Honorable Manuel L. Real, United States District Judge, on January 27, 1969, on order to show cause re preliminary injunction, and, good cause appearing therefore,

IT IS HEREBY ORDERED:

1. That Plaintiff's application for the convening of a three-judge court, pursuant to the provisions of 28 U.S.C. 2282 and 2284, is hereby granted;

2. That until a judgment is entered in this action, defendants may not return and mark "Unlawful" any mail addressed to plaintiff, but instead may hold all mail sent to plaintiff for examination by plaintiff and such mail shall be delivered to plaintiff as is clearly not connected with the alleged unlawful activity which resulted in the Order by the Post Office Department of which plaintiff complains, i.e., any mail not relating to the magazines "Me", "Gigi", "Susy", "Match", "Bunny", "Golden Girls" and "Girl Friend".

DATED this 29th day of January, 1969.

/s/ Manuel L. Real  
MANUEL L. REAL

United States District Judge

Approved as to Form:

WM. MATTHEW BYRNE, JR.,  
United States Attorney

FREDERICK M. BROSILO, JR.,  
Assistant U. S. Attorney  
Chief, Civil Division

/s/ Larry L. Dier  
LARRY L. DIER  
Asst. U. S. Attorney  
Attorneys for Defendants, et al.  
WINTON M. BLOUNT

## AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA     )  
                                       )   SS  
 COUNTY OF                    )

YVONNE BURROUGHS, being first duly sworn, deposes and says:

That I am a citizen of the United States, and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; that my business address is Suite 700, 1680 North Vine Street, Hollywood, California 90028; that on January 27, 1969, I served the within ORDER RE: PRELIMINARY INJUNCTION on the Defendants by plaicng a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Hollywood addressed as follows:

WM. MATTHEW BYRNE, JR.

United States Attorney

FREDERICK M. BROSI0, JR.

Asst. U. S. Attorney

Chief, Civil Division

LARRY L. DIER

Asst. U. S. Attorney

United States Court House

312 North Spring Street

Los Angeles, California 90012

That there is delivery service by United States Mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ Yvonne Burroughs  
 YVONNE BURROUGHS

Subscribed and sworn to before  
 me on January 27, 1969.

/s/ Evaleen Saquin

EVALEEN SAQUIN

Notary Public, Cal.

Com. Exp. June 18, 1971, Los Angeles Co.

1680 North Vine St., Hollywood, Calif. 90028

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

ANSWER TO COMPLAINT

[Filed March 11, 1969]

For their answer to the plaintiff's complaint, the defendants admit, deny, and allege as follows:

I.

Admit the allegations contained in paragraphs IV, V, VI, and XII of plaintiff's complaint.

II.

Deny the allegations of paragraphs III, VII, VIII, IX and XI.

III.

Allege, as to paragraph X, the same admissions, denials, and allegations as in Count 1.

IV.

Allege that this is an unconsented suit against the sovereign and that the plaintiff fails to state a claim for relief against the defendants.

DATED: March 11, 1969.

WM. MATTHEW BYRNE, JR.  
United States Attorney  
FREDERICK M. BROSIO, JR.  
Assistant U. S. Attorney  
Chief of Civil Division

/s/ Larry L. Dier  
LARRY L. DIER  
Assistant U. S. Attorney  
Attorneys for Defendants

## CERTIFICATE OF SERVICE BY MAIL

I, Theresa L. Wilson, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on March 11, 1969, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of ANSWER TO COMPLAINT addressed to:

Mr. Stanley Fleishman  
Attorney at Law  
Suite 700, Taft Building  
1680 Vine Street  
Hollywood, California 90028

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on March 11, 1969, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Theresa L. Wilson  
THERESA L. WILSON



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK  
Room 231, U. S. Courthouse  
Los Angeles, California 90012

[Filed March 26, 1969]

Stanley Fleishman  
Attorney-at-Law  
Suite 700, Taft Bldg.  
1680 Vine St.  
Hollywood, Calif. 90028

Larry L. Dier,  
Assistant U. S. Attorney  
Room 1100  
U. S. Courthouse  
312 North Spring St.  
Los Angeles, Calif.

Re: 69-64-R-Civil—Tony Rizzi, etc. vs  
Marvin Watson, etc. et al

Gentlemen:

PLEASE TAKE NOTICE that the application for preliminary injunction in the above-entitled cause, has been set for hearing before the Honorable Shirley M. Hufstедler, U.S. Circuit Judge, 9th District; the Honorable Charles H. Carr, U.S. District Judge; and the Honorable Manuel L. Real, U. S. District Judge, to be called in Courtroom No. 14, in the U. S. Courthouse, 312 No.

Spring St., Los Angeles, Calif., at 10 AM on April 10th,  
1969, pursuant to 28 USC 2284.

JOHN A. CHILDRESS  
Clerk

By /s/ Josefina Dean  
JOSEFINA DEAN  
Deputy Clerk

Notice Mailed 3/26/69

Copies: Hon. Shirley M. Hufstedler  
U.S. Circuit Judge, 9th District  
# 1639 U.S. Courthouse  
Los Angeles, Calif., 90012

Hon. Charles H. Carr  
U.S. District Judge  
Courtroom # 2 U. S. Courthouse  
Los Angeles, Calif.  
Mr. L. B. Figg, Clerk for Judge Carr

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

No. 69-64-R

TONY RIZZI, doing business as THE MAIL BOX, PLAINTIFF  
v.

WINTON M. BLOUNT, Postmaster General of the United  
States of America; and EVERETT T. CARPENTER,  
Postmaster of the City of Los Angeles, State of  
California, DEFENDANTS

MEMORANDUM OPINION AND ORDER

[Filed June 10, 1969]

Before: HUFSTEDLER, Circuit Judge, and CARR and REAL,  
District Judges

PER CURIAM:

Plaintiff brought this action for declaratory and injunctive relief against the Postmaster General of the United States and the Postmaster of the City of Los Angeles. Plaintiff alleges that 39 U.S.C. § 4006,<sup>1</sup> on its face, and as construed and applied to plaintiff, violates

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<sup>1</sup> 39 U.S.C. § 4006 provides: "Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances of money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representative, to return the registered letters or other letters or mail to the sender marked 'unlawful'; and

(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes."

rights guaranteed to the plaintiff by the First, Fifth, Sixth, and Seventh Amendments of the United States Constitution. A three-judge District Court was convened pursuant to 28 U.S.C. § 2284 to hear plaintiff's application for an injunction to restrain enforcement of the statute.

The statute authorizes the Postmaster General, after an administrative hearing, to decide whether mailed matter is obscene and further authorizes the Postmaster General to impose a mail block against the sender of such matter following the Postmaster General's determination that the matter is obscene. The burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed.

The statute is unconstitutional on its face, because it fails to meet the requirements of *Freedman v. Maryland* (1965) 380 U.S. 51. (Cf. *Lamont v. Postmaster General* (1965) 381 U.S. 301.) We have no occasion to consider the remaining contentions of the parties, and we do not pass upon the nature of the materials claimed to be the subject of the administrative hearing.

Counsel for plaintiff is directed to prepare proposed findings of fact, conclusions of law, and judgment, pursuant to Local Rule 7 of this court and the Federal Rules of Civil Procedure.

/s/ Shirley M. Hufstедler  
SHIRLEY M. HUFSTEDLER  
United States Circuit Judge

/s/ Charles H. Carr  
CHARLES H. CARR  
United States District Judge

/s/ Manuel L. Real  
MANUEL L. REAL  
United States District Judge

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Lodged June 23, 1969]

[Filed August 1, 1969]

THE ABOVE ENTITLED CAUSE came on regularly for hearing on plaintiff's motion for injunctive relief against the Postmaster General of the United States and the Postmaster of the City of North Hollywood, before the Honorable Shirley M. Hufstедler, Circuit Judge; and Honorables Charles H. Carr and Manuel L. Real, District Judges. Stanley Fleishman appeared for plaintiff, and Wm. Matthew Byrne, Jr., United States Attorney, by Larry Dier, Assistant United States Attorney, appeared for defendants.

The Court having heard oral argument, and having examined the file herein, and being fully advised, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

Plaintiff Tony Rizzi, doing business as The Mail Box, is engaged in distributing by mail various publications.

II

Defendant Winton M. Blount is the Postmaster General of the United States of America, and defendant Everett T. Carpenter is the Postmaster of the City of North Hollywood, State of California. Defendant Carpenter, in his capacity as Postmaster, is charged with the duties of administering and managing the United States Post Office in and for the said City of North Hollywood, State of California, and is in charge and responsible for the

receipt and distribution of materials sent through the United States mails for delivery in and from said City.

### III.

On or about December 31, 1968, Peter R. Rosenblatt, Judicial Officer of the Post Office Department, executed Order No. 68-103 addressed to defendant Carpenter herein, instructing said defendant Carpenter to return to the sender all mail addressed to plaintiff (with minor exceptions) with the word "Unlawful" stamped upon the outside of such mail.

### IV

The said Order was made purportedly pursuant to 39 U.S.C. § 4006. Said Section authorizes the Postmaster General, after an administrative hearing, to decide whether mail matter is obscene, and further authorizes the Postmaster General to impose a mail block against the sender of such matter following the Postmaster General's determination that the matter is obscene. The burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed.

### V

39 U.S.C. § 4006 fails to meet the essential requirements necessary to restrain speech, set forth by the United States Supreme Court in *Freedman v. Maryland* (1965), 380 U.S. 51.

### VI

It is not necessary to consider the remaining contentions of the parties, and we do not pass upon the nature of the materials which were the subject of the administrative hearing.

### CONCLUSIONS OF LAW

This is a proper case for the convening of a three-judge District Court in accordance with 28 U.S.C. § 2284 to hear plaintiff's application for an injunction to restrain

enforcement of 39 U.S.C. § 4006 on the ground that the said statute, on its face and as construed and applied to plaintiff, violates rights guaranteed to the plaintiff by the First, Fifth and Sixth Amendments to the United States Constitution.

## II

Defendants have imposed a mail block against plaintiff's mail pursuant to 39 U.S.C. § 4006.

## III

39 U.S.C. § 4006 is unconstitutional on its face, because it fails to meet the requirements of *Freedman v. Maryland* (1965), 380 U.S. 51, wherein the United States Supreme Court imposed strict limitations on interference with freedoms of speech and press.

## IV

Plaintiff is entitled to a judgment:

(a) directing the defendants to vacate the Order of the Judicial Officer of the Post Office Department (No. 68-103), executed on or about December 31, 1968; and

(b) directing the defendants to deliver forthwith to plaintiff all mail addressed to plaintiff now in defendants' possession and to forward all mail addressed to plaintiff, without interference.

## V

Plaintiff is entitled to a judgment restraining the defendants, and each of them, their agents, servants, employees and attorneys, and all persons in active concert or participating with them, from instituting against plaintiff any proceedings under 39 U.S.C. § 4006, and from enforcing or attempting to enforce the provisions of 39 U.S.C. § 4006 against plaintiff.

DATED: This 1st day of August, 1969.

/s/ Shirley M. Hufstedler  
SHIRLEY M. HUFSTEDLER  
United States Circuit Judge

/s/ Charles H. Carr  
CHARLES H. CARR  
United States District Judge

/s/ Manual L. Real  
MANUAL L. REAL  
United States District Judge

APPROVED AS TO FORM:

/s/ Stanley Fleishman  
STANLEY FLEISHMAN  
Attorney for Plaintiff

WM. MATTHEW BYRNE, JR.,  
United States Attorney

By /s/ Larry L. Dier  
LARRY DIER  
Assistant United States Attorney  
Attorneys for Defendants



## AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA       )  
                                   ) SS  
 COUNTY OF LOS ANGELES   )

YVONNE BURROUGHS, being first duly sworn, deposes and says:

That I am a citizen of the United States, and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; that my business address is Suite 700, 1680 North Vine Street, Hollywood, California 90028; that on June 19, 1969, I served the within FINDINGS OF FACT AND CONCLUSIONS OF LAW on the Defendants by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles addressed as follows:

Wm. Matthew Byrne, Jr., U. S. Attorney  
 Attention: Larry Dier, Asst. U. S. Attorney  
 6th Floor, Federal Building  
 Los Angeles, California 90012

That there is delivery service by United States Mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ Yvonne Burroughs  
 YVONNE BURROUGHS

Subscribed and sworn to before me on June 19, 1969.

/s/ Evaleen Saquin  
 EVALEEN SAQUIN—Notary Public-Cal.  
 Com. Exp. June 18, 1971—Los Angeles Co.  
 1680 North Vine St., Hollywood, Calif. 90028

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

JUDGMENT

[Lodged June 23, 1969]

[Filed August 1, 1969]

THE COURT, having made its Findings of Fact and Conclusions of Law in the above entitled matter,

IT IS ORDERED, ADJUDGED AND DECREED, that defendants WINTON M. BLOUNT, Postmaster General of the United States of America; and EVERETT T. CARPENTER, Postmaster of the City of North Hollywood, State of California, and their agents, servants, employees and attorneys, and all persons in active concert or participating with them:

1. Vacate the Order of the Judicial Officer of the Post Office Department (No. 68-103) executed on or about December 31, 1968; and

2. Deliver forthwith to plaintiff all mail addressed to plaintiff now in defendants' possession and to forward all mail addressed to plaintiff, without interference; and

3. Refrain from any proceedings, acts or conduct enforcing the provisions of 39 U.S.C. § 4006 against plaintiff.

DATED: This 1st day of August 1969.

/s/ Shirley M. Hufstedler  
SHIRLEY M. HUFSTEDLER  
United States Circuit Judge

/s/ Charles H. Carr  
CHARLES H. CARR  
United States District Judge

/s/ Manuel L. Real  
MANUEL L. REAL  
United States District Judge

APPROVED AS TO FORM:

/s/ Stanley Fleishman  
STANLEY FLEISHMAN  
Attorney for Plaintiff

WM. MATTHEW BYRNE, JR.,  
United States Attorney

By /s/ Larry L. Dier  
LARRY DIER  
Assistant United States Attorney  
Attorneys for Defendants

## AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA            )  
   ) SS  
 COUNTY OF LOS ANGELES        )

YVONNE BURROUGHS, being first duly sworn, deposes and says:

That I am a citizen of the United States, and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; that my business address is Suite 700, 1680 North Vine Street, Hollywood, California 90028; that on June 19, 1969, I served the within JUDGMENT on the Defendants by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles addressed as follows:

Wm. Matthew Byrne, Jr., U. S. Attorney  
 Attention: Larry Dier, Asst. U. S. Attorney  
 6th Floor, Federal Building  
 Los Angeles, California 90012

That there is delivery service by United States Mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ Yvonne Burroughs  
 YVONNE BURROUGHS

Subscribed and sworn to before me on June 19, 1969.

/s/ Evaleen Saquin  
 EVALEEN SAQUIN—Notary Public-Cal.  
 Com. Exp. June 18, 1971—Los Angeles Co.  
 1680 North Vine St., Hollywood, Calif. 90028

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

MOTION FOR STAY OF JUDGMENT PENDING APPEAL;  
AND AFFIDAVIT

[Filed August 13, 1969]

TO: HONORABLE SHIRLEY M. HUFSTEDLER,  
UNITED STATES CIRCUIT JUDGE, UNITED  
STATES COURT OF APPEALS, 9TH CIRCUIT;  
HONORABLE CHARLES H. CARR AND MAN-  
UEL L. REAL, UNITED STATES DISTRICT  
JUDGES, CENTRAL DISTRICT OF CALIFOR-  
NIA:

The defendants, by and through their attorneys, respectfully move this Court for a stay of the Judgment entered herein on August 1, 1969, pending appeal. This motion is being made pursuant to Rule 62 of the Federal Rules of Civil Procedure and is based upon the Affidavit of Assistant U. S. Attorney David H. Anderson attached hereto and incorporated herein by reference.

DATED: August 12, 1969.

WM. MATTHEW BYRNE, JR.  
United States Attorney  
FREDERICK M. BROSILO, JR.  
Assistant U. S. Attorney  
Chief of Civil Division

/s/ David H. Anderson  
DAVID H. ANDERSON  
Assistant U. S. Attorney  
Attorneys for Defendants

# AFFIDAVIT OF ASSISTANT U. S. ATTORNEY DAVID H. ANDERSON

STATE OF CALIFORNIA        )  
  )   SS.  
COUNTY OF LOS ANGELES    )

DAVID H. ANDERSON, being first duly sworn, deposes and says:

1. That he is an Assistant U. S. Attorney and has been assigned to this matter in the absence of Assistant U. S. Attorney Larry L. Dier (who is presently on vacation);

2. That on August 1, 1969 judgment was entered herein in favor of plaintiff and against defendants holding 39 U.S.C. § 4006 to be unconstitutional and ordering that defendants deliver to plaintiff all mail being held by defendants pursuant to said section;

3. That said judgment has been communicated to the Department of Justice in Washington, D. C., and the United States Solicitor General has been asked to decide whether an appeal should be taken from this adverse decision;

4. That pursuant to 28 U.S.C. § 2101(b) the defendants have 60 days within which to file a direct appeal to the United States Supreme Court;

5. That the undersigned has been advised by the U. S. Department of Justice that a decision on whether to appeal can be reached within 20 to 30 days from this date;

6. That on August 8, 1969, plaintiff's counsel sent a formal demand letter to the United States Attorney requesting that plaintiff's mail be delivered forthwith to plaintiff;

7. That important constitutional questions are involved herein which may have to be resolved by the United States Supreme Court;

8. That delivery of plaintiff's mail to plaintiff at this time would render moot the issues involved herein;

9. That all efforts possible are being expended to obtain a decision at the earliest time on whether or not

to appeal this judgment to the United States Supreme Court;

10. That a 30 day stay of judgment from this date would preserve the status quo and would not cause irreparable harm to the plaintiff herein;

11. That plaintiff's counsel has been advised by telephone of the filing of this motion and will be advised of the time and place of hearing on it, in accordance with Local Rule 3(j).

/s/ David H. Anderson  
DAVID H. ANDERSON

Subscribed and sworn to before  
me this 12th day of August, 1969.

/s/ Lois M. Parkinson  
Notary Public in and for said  
County and State  
My Commission expires Nov. 9, 1970.

## CERTIFICATE OF SERVICE BY MAIL

I, REBECCA R. JIMENEZ, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on August 12, 1969, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of EX PARTE MOTION FOR STAY OF JUDGMENT PENDING APPEAL; AND AFFIDAVIT addressed to

Stanley Fleishman, Esq., Atty. at Law  
Suite 700 Taft Building  
1680 Vine Street  
Hollywood, California 90028

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on August 12, 1969, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Rebecca R. Jimenez  
REBECCA R. JIMENEZ



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

OPPOSITION TO EX PARTE MOTION FOR STAY OF JUDGMENT PENDING APPEAL AND MOTION TO REQUIRE DEFENDANTS TO DELIVER FORTHWITH TO PLAINTIFF ALL MAIL ADDRESSED TO PLAINTIFF BEING HELD BY DEFENDANTS & AFFIDAVIT

[Filed August 18, 1969]

TO: HONORABLE SHIRLEY M. HUFSTEDLER, United States Circuit Judge, United States Court of Appeals for the Ninth Circuit, HONORABLE CHARLES H. CARR and HONORABLE MANUEL L. REAL, United States District Judges, Central District of California:

Plaintiff, by and through his attorney, hereby opposes defendants' ex parte motion for stay of judgment pending appeal, and, in addition, hereby respectfully moves this Court for an order compelling defendants to deliver forthwith to plaintiff all mail addressed to plaintiff now in possession of defendants and to forward to plaintiff without interference all mail addressed to plaintiff.

This opposition and motion is based on the affidavit of Peter Marx, attached hereto and incorporated herein by reference, the judgment in the above-entitled cause, filed and entered on August 1, 1969, the findings of fact and conclusions of law in the above-entitled cause, filed August 1, 1969, the memorandum opinion and order in the above-entitled cause, filed June 10, 1969, and all the files, records and pleadings herein.

DATED: August 15, 1969.

STANLEY FLEISHMAN

By /s/ Peter Marx,  
PETER MARX  
Attorneys for Plaintiff

STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF LOS ANGELES )

1. I am an attorney admitted to the practice of law in the State of California, and the Central and Northern Districts of the United States District Court.

2. I am associated with the law offices of Stanley Fleishman, counsel for plaintiff in the case of *Tony Rizzi, etc. v. Blount, et al.*, Civil No. 69-64-R, United States District Court, Central District of California.

3. On or about December 31, 1968, Peter R. Rosenblatt, Judicial Officer of the Post Office Department, executed Order No. 68-103, requiring that certain mail addressed to plaintiff being held by the Post Office be returned the senders thereof. Said order was issued pursuant to the provisions of 39 U.S.C. 4006.

4. On or about January 9, 1969, plaintiff filed this aforementioned action, seeking, *inter alia*, injunctive relief against the enforcement of the provisions of 39 U.S.C. 4006, and a declaration that said statute is unconstitutional.

5. On or about January 29, 1969, the Honorable Manuel L. Real, United States District Judge, issued an order granting plaintiff's application for the convening of a three-judge court and further ordering that, pending judgment, defendants were not to return and mark "unlawful" any mail addressed to plaintiff, but instead to hold all such mail and deliver to plaintiff any mail clearly not connected with the alleged unlawful activity which resulted in the aforesaid order by the Post Office Department.

6. On or about June 10, 1969, the three-judge court which had been convened as aforesaid filed its Memorandum Opinion And Order in the above-noted cause, holding that 39 U.S.C. 4006 "... is unconstitutional on its face, because it fails to meet the requirements of *Freedman v. Maryland* (1965) 380 U.S. 51 (Cf., *Lamont v. Postmaster General* (1965) 381 U.S. 301.)" Findings of fact and conclusions of law were filed August 1, 1969, and the judgment in the cause was filed and entered August 1, 1969. Pursuant to said judgment, the aforesaid order of the Judicial Officer of the Post Office Department was vacated, defendants were ordered to deliver forthwith to plaintiff all mail addressed to plaintiff now in defendants' possession and to forward without interference all mail addressed to plaintiff and to refrain from any proceedings, acts or conduct enforcing the provisions of 39 U.S.C. 4006 against plaintiff.

7. Plaintiff has accordingly made written demand upon defendants for the return of the aforesaid mail. Defendants are still holding said mail, and have moved for a stay of judgment pending appeal. They allege, *inter alia*, "that delivery of plaintiff's mail to plaintiff at this time would render moot the issues involved herein." See affidavit of David H. Anderson. Your affiant respectfully submits that such is not the case, since plaintiff, being in the mail order business, would have had standing to challenge the statute even if his mail had not actually been seized. Furthermore, in any event, as plaintiff continued to operate his mail order business, he may well be subjected to additional seizures should the decision be overturned on appeal. If the decision is affirmed, plaintiff will be able to continue operating his business without the restraints of the statute. In other words, regardless of the outcome on appeal, plaintiff will directly be affected thereby and in no sense can it be said that the issues involved herein would be rendered moot by return forthwith of mail to plaintiff presently held by defendants. In this regard, your affiant respectfully refers the court to *Ginsberg v. New York*, 390 U.S. 629, 633, 88 S.Ct. 1274, 1277, Fn. 2 (1968).

8. It is further alleged by defendants that a 30-day stay of judgment would preserve the status quo and would not cause irreparable harm to plaintiff. As to preserving the status quo, your affiant respectfully refers the Court to the above discussion regarding the issue of mootness, and respectfully submits that return of the mail would not effectually disturb the status quo. With respect to irreparable harm, initially it is to be noted that plaintiff's mail has now been held up for approximately eight months. Clearly, this amounts to an extensive prior restraint of First Amendment material. Furthermore, said prior restraint was effected pursuant to the provisions of a statute which this Court found to be unconstitutional on its face, in violation of the First Amendment, precisely because, under the terms of said statute, a prior restraint such as that involved herein could exist and continue to exist for an unlimited period of time, contrary to the very explicit requirements in this regard set forth by the United States Supreme Court in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965). Your affiant thus submits that the continued existence of such a restraint constitutes per se irreparable harm, and, in view of the ruling of this Court, should not be allowed to continue further. Your affiant further states that irreparable harm exists not only by virtue of the limitation on plaintiff's First Amendment activities, but also by virtue of the fact that plaintiff is being deprived of considerable sums of money to which he is entitled, by virtue of the fact that defendants are holding plaintiff's mail. Additionally, the First Amendment rights (and money) of those people who wrote letters to plaintiff are also directly affected by the fact that their mail and money, addressed to plaintiff, is being held. *Lamont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493 (1965).

9. Accordingly, your affiant respectfully submits that there is and will continue to be considerable irreparable harm to plaintiff as a result of the fact that defendants are holding plaintiff's mail. Additionally, it is submitted that defendants have shown no countervailing reason which would require that the mail be held, particularly in view

of the substantial First Amendment rights which are being affected thereby. In view of the "preferred position" of the First Amendment, *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870 (1943), your affiant thus respectfully submits that the motion for stay should be denied, and that plaintiff's motion for return of the mail should be granted.

/s/ Peter Marx  
PETER MARX

Subscribed and sworn to before  
me this 15th day of August, 1969.

/s/ Richard Lasalle  
Notary Public in and for said  
County and State.

## AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA            )  
  )   SS  
COUNTY OF LOS ANGELES    )

ANNELL MOORE, being first duly sworn, deposes and says:

That I am a citizen of the United States, and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; that my business address is Suite 700, 1680 No. Vine Street, Hollywood, California 90028; that on \_\_\_\_\_ 19\_\_\_\_, I served the within Opposition to ex parte motion for stay of judgment pending appeal and motion to require defendants to deliver forthwith to plaintiff all mail addressed to plaintiff being held by defendants; and affidavit on the defendant by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Hollywood, California addressed as follows:

Larry Dier, Asst. U.S. Attorney  
Federal Courthouse  
312 North Spring Street  
Los Angeles, California 90012

That there is delivery service by United States Mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ Annell Moore

Subscribed and sworn to before  
me on August 15, 1969.

/s/ Richard Lasalle

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

ORDER

[Filed August 20, 1969]

GOOD CAUSE having been shown, it is hereby ordered, adjudged, and decreed that the Judgment entered herein on August 1, 1969 be and shall be stayed until September 10, 1969, pending appeal.

DATED: This 20th day of August, 1969.

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United States District Judge

/s/ Charles H. Carr  
United States District Judge

/s/ Shirley Hufstedler  
Circuit Court Judge

Presented By:

/s/ David H. Anderson  
DAVID H. ANDERSON  
Assistant U. S. Attorney

JAC: To be filed without signature of Judge Real.

Judge Carr says that docket entry should show order signed by Judges Carr and Hufstedler but not signed by Judge Real as he is absent.

LBF

## CERTIFICATE OF SERVICE BY MAIL

I, REBECCA R. JIMENEZ, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on August 12, 1969, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of ORDER addressed to

Mr. Stanley Fleishman, Attorney at Law  
Suite 700, Taft Building  
1680 Vine Street  
Hollywood, Calif. 90028

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on August 12, 1968, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Rebecca R. Jimenez  
REBECCA R. JIMENEZ



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

NOTICE OF APPEAL TO SUPREME COURT

[Filed Sept. 2, 1969]

NOTICE IS HEREBY GIVEN that Winton M. Blount, Postmaster General of the United States and Everett T. Carpenter, Postmaster of the City of Los Angeles, hereby appeal to the Supreme Court of the United States under 28 U.S.C. § 1252 and § 1253. This appeal is taken from the Judgment entered August 1, 1969, which, *inter alia*, enjoined the defendants from enforcing the provisions of 39 U.S.C. § 4006.

DATED: This 2nd day of September, 1969.

WM. MATTHEW BYRNE, JR.  
United States Attorney

FREDERICK M. BROSIO, JR.  
Asst. U.S. Attorney  
Chief, Civil Division

/s/ Larry L. Dier  
LARRY L. DIER  
Asst. U.S. Attorney  
Attorneys for Defendants

## CERTIFICATE OF SERVICE BY MAIL

I, ALICE J. PARKA, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on September 2, 1969, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of NOTICE OF APPEAL TO SUPREME COURT addressed to

MR. STANLEY FLEISHMAN

Attorney at Law

Suite 700, Taft Building

1680 Vine Street

Hollywood, California, 90028

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on September 2, 1969, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Alice J. Parka  
ALICE J. PARKA

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

ORDER STAYING JUDGMENT

[Filed Sept. 26, 1969]

GOOD CAUSE having been shown, It is hereby  
ORDERED, ADJUDGED, AND DECREED that the  
Judgment entered herein on August 1, 1969, is stayed  
until it becomes final after appeal.

DATED: This 26 day of September, 1969.

/s/ Shirley Hufstедler  
United States Circuit Court  
Judge

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United States District Judge

/s/ Real  
United States District Judge

Presented by:

/s/ Larry L. Dier  
LARRY L. DIER  
Asst. U.S. Attorney

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

EX PARTE MOTION FOR STAY OF JUDGMENT PENDING  
APPEAL AND AFFIDAVIT OF LARRY L. DIER

[Filed Sept. 26, 1969]

The defendants, by and through their attorneys, respectfully move this Court for a stay of the Judgment entered herein on August 1, 1969, until it becomes final after appeal. This motion is being made pursuant to Rule 62 of the Federal Rules of Civil Procedure and is based upon the Affidavit of Assistant United States Attorney Larry L. Dier attached hereto.

DATED: This 26th day of September, 1969.

WM. MATTHEW BYRNE, JR.  
United States Attorney  
FREDERICK M. BROSIO, JR.  
Asst. U.S. Attorney  
Chief, Civil Division

/s/ Larry L. Dier  
LARRY L. DIER  
Asst. U.S. Attorney  
Attorneys for Defendants,  
Winton M. Blount, et al.

## AFFIDAVIT OF LARRY L. DIER

STATE OF CALIFORNIA           )  
   )   SS.  
 COUNTY OF LOS ANGELES    )

LARRY L. DIER, being first duly sworn, deposes and says:

1. That he is an Assistant United States Attorney and is the attorney chiefly responsible for this litigation;

2. That on August 1, 1969, Judgment was entered herein in favor of plaintiff and against defendants holding 39 U.S.C. § 4006 to be unconstitutional and ordering that defendants deliver to plaintiff all mail being held by defendants pursuant to said section;

3. That said Judgment has been communicated to the Department of Justice in Washington, D.C., and the United States Solicitor General has been asked to decide whether an appeal should be taken from this adverse decision;

4. That on September 2, 1969, a Notice of Appeal was filed and on September 23, 1969, he was notified that the Solicitor General has authorized the appeal to proceed on its merits;

5. That on August 8, 1969, plaintiff's counsel sent a formal demand letter to the United States Attorney requesting that plaintiff's mail be delivered forthwith to plaintiff;

6. That important constitutional questions are involved herein which will be resolved by the United States Supreme Court;

7. That delivery of plaintiff's mail to plaintiff at this time may render moot the issues involved herein;

8. That plaintiff's counsel was advised by telephone of the filing of this motion by telephone at about 10:30 a.m., September 26, 1969, in accordance with Local Rule 3(j). Plaintiff's counsel requested him to advise the Court that he feels any stay ought to only allow defendants to hold any mail already detained but not allow

defendants to detain mail henceforth directed to plaintiffs.

/s/ Larry L. Dier  
LARRY L. DIER

Subscribed and sworn to before me  
this 26th day of September, 1969.

/s/ Lois M. Parkinson  
LOIS M. PARKINSON  
Notary Public in and for said  
County and State  
My Commission Expires Nov. 9, 1970.

**SUPREME COURT OF THE UNITED STATES**

No. 788, October Term, 1969

WINTON M. BLOUNT, Postmaster General of the  
United States, ET AL., APPELLANTS

v.

TONY RIZZI DBA THE MAIL BOX

APPEAL from the United States District Court for  
the Central District of California.

The statement of jurisdiction in this case having been  
submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary  
calendar.

March 2, 1970

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

No. 12812

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1969	
June 12	<p>Complaint for temporary restraining order &amp; Preliminary injunction, with Exh. A, filed.</p> <p>Letter dated 6/12/69 from U. S. Att'y to deft. advising that proposed temporary restraining order for Judge Edenfield's consideration will be presented to him on Monday, June 16, 1969, at 4:30 p.m. attached to complaint.</p> <p>Summons issued &amp; delivered to U.S. Marshal.</p>
June 17	<p>Marshal's return on service executed 6-13-69, filed.</p>
June 17	<p>Deft's motion to dismiss complaint for temporary restraining order &amp; preliminary injunction, filed.</p> <p>Recitation of points &amp; authorities in support of deft's motion to dismiss, with attachments, filed.</p> <p>Motion for interlocutory injunction, filed. Counterclaimant's petition for interlocutory &amp; permanent injunction &amp; application for 3-Judge court, filed.</p> <p>To NE by counsel. Came on for hearing on petition for temporary restraining order—case reset for Monday, June 23, 1969 at 3:00 p.m.</p>
June 23	<p>Hearing had on pet. for temporary restraining order. The following were filed: (1) Pltfa.' Memorandum in support of application for preliminary injunction; (2) Motion by U. S. to dismiss deft's. "Motion for interlocutory injunction" and deft's. "Petition for interlocutory and permanent injunction and application for three-judge court."</p> <p>Deft's. supplemental recitation of points and authorities in support of motion to dismiss complaint for temporary restraining order and preliminary injunction—filed.</p>

## DATE

## PROCEEDINGS

1969

- June 23 Order of Chief Judge John R. Brown, U.S. C.A., designating Circuit Judge Lewis R. Morgan and District Judges Frank A. Hooper and Newell Edenfield to constitute a 3-Judge Court—filed. (Counsel advised)
- Set for hearing before 3-Judge Court on Tuesday, 7-1-69, at 9:30 A.M. Counsel advised.
- June 25 Copy of pleadings to date to 3 Judges.
- June 30 Pltfs' reply brief, filed. Copy to each judge. Transcript of proceedings of 6-23-69, filed. To FAH.
- July 1 Hearing had before 3-Judge Panel, on counterclaim attacking Constitutionality of Govt's. petition. Court allowed parties to 7-15-69 to file briefs, then to be submitted.
- July 15 Pltf's. supplemental brief, filed. Copy to each judge.
- July 16 SUBMITTED PURSUANT TO DOCKET ENTRY OF 7/1/69.
- Aug. 25 Steno-type notes, filed.
- Sept. 9 ORDER filed that findings of obscenity under the statutory scheme here is either too little (§ 4007) or too late (§ 4006), and is unconstitutional & the court GRANTS DEFT'S Motion to Dismiss and its counterclaim. Copies to counsel.
- Sept. 24 NOTICE OF APPEAL TO THE SUPREME COURT filed by pltfs. (Copy to opposing counsel & Clerk Supreme Court)
- Oct. 16 JUDGMENT filed and entered by Clerk, for deft., THE BOOK BIN, and against pltfs., U. S. & The Postmaster General, and for costs. (Copy to counsel)
- Oct. 16 Pltfs' notice of appeal to the Sup. Ct. from the final judgment entered Oct. 16, 1969, filed. Certified copy to Sup. Ct.; copy to opposing counsel.

1970—In the United States Supreme Court

- March 2 Order of the Supreme Court noting probable jurisdiction and placing case on summary calendar.



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA

Civil No. 12812

UNITED STATES OF AMERICA and the  
POSTMASTER GENERAL, PLAINTIFFS

v.

THE BOOK BIN at 123 Simpson Street, N. W.,  
Atlanta, Georgia, DEFENDANT

COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION

[Filed June 12, 1969]

For their claims against the defendant, the plaintiffs allege as follows:

1. That this Court has jurisdiction under 28 U.S.C. 1345 and 39 U.S.C. 4007.

2. That the attached Affidavit, marked as Exhibit "A", is incorporated herein by reference and shows that a Complaint has been filed under 39 U.S.C. 4006 against the defendant to determine the obscenity of materials being mailed by the defendant.

3. That pursuant to 39 U.S.C. 4007, the plaintiffs are entitled to a Temporary Restraining Order and Preliminary Injunction directing the detention of the defendant's incoming mail during the pendency of the administrative hearing before the Post Office.

4. That, as more fully appears in Exhibit "A", this Temporary Restraining Order and Preliminary Injunction are needed to preserve the status quo and, in the event the material being mailed by The Book Bin is found obscene, to allow for the effective enforcement of the statutes against mailing obscene matters which Congress clearly intended in the enactment of 39 U.S.C. 4006 and 4007.

5. That, as provided by 39 U.S.C. 4007, the plaintiffs are willing for the Temporary Restraining Order and

Preliminary Injunction to provide that the detained mail may be opened to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity.

WHEREFORE, plaintiffs pray that a Temporary Restraining Order issue forthwith directing the detention by the Post Office Department of all of the defendant's incoming mail; that a time be set for a hearing on the plaintiffs' request for a Preliminary Injunction detaining such mail during the pendency of the statutory proceeding or appeal therefrom.

/s/ John W. Stokes, Jr.  
JOHN W. STOKES, JR.  
United States Attorney

/s/ Charles B. Lewis, Jr.  
CHARLES B. LEWIS, JR.  
Assistant United States Attorney  
Attorneys for plaintiffs,  
United States of America and  
The Postmaster General

## VERIFICATION

STATE OF GEORGIA       )  
                                   ) ss.  
 COUNTY OF FULTON     )

Charles B. Lewis, Jr., being first duly sworn, deposes and says: That he is an Assistant United States Attorney and is the attorney chiefly responsible for this litigation; that he has read the above Complaint and knows the contents of it; that the information contained in the Complaint has been furnished by official government sources; and, based on information and belief, the allegations contained in the Complaint are true.

/s/ Charles B. Lewis, Jr.  
 CHARLES B. LEWIS, JR.,  
 Affiant

Subscribed and Sworn to before me this 12th day of June, 1969.

/s/ Theodore E. Smith  
 Notary Public in and for said County and State.  
 My Commission Expires:

## EXHIBIT "A"

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA

[Caption Omitted]

AFFIDAVIT OF WILLIAM F. LAWRENCE IN SUPPORT OF  
COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION

I, William F. Lawrence, having been duly sworn, depose and say:

1. The Affiant is Complainant in the administrative proceeding instituted in the Post Office Department, POD Docket 3/23 and in support of this application for a temporary restraining order and preliminary injunction pursuant to Title 39, U. S. Code § 4007, states:

2. That the Complaint against The Book Bin, copy whereof is attached hereto, sets forth a good and sufficient cause of action under the provisions of Title 39, U. S. Code § 4006.

3. That the evidence to be presented at the administrative hearing on the Complaint will include a magazine, and advertising material, for which, and by which, remittances of money are solicited by The Book Bin, and which are described in certain advertisements and magazines, true copies of which are attached hereto, which said concern deposits or causes to be deposited in the mails.

4. That Affiant has received certain of the matter deposited in the mails by The Book Bin, responsive to its advertising matter, and is convinced that it is obscene, lewd, lascivious, indecent, filthy and vile within the meaning and definition of such terms in 39 U. S. C. § 4006.

5. That, upon information and belief, The Book Bin is not a publisher or distributor having second-class mail entry, and thus does not come within the exception contained in 39 U. S. C. § 4007.

6. Affiant avers that The Book Bin is receiving substantial revenues of mail daily containing remittances of

money pursuant to the unlawful enterprise hereinbefore and in the Complaint in POD Docket No. 3/23 more fully described, and will continue to receive such mail and remittances during the pendency of the administrative proceeding, and, therefore, Affiant respectfully submits that it is necessary to its effective enforcement of Title 39, U. S. Code, § 4006, that an order be issued directing that mail addressed to The Book Bin be held and detained by the appropriate delivery postmaster pending the conclusion of all administrative proceedings against said mailer pursuant to 39 U. S. C. § 4007, or for such other relief as the Court may deem appropriate in the premises.

The Affiant will not object to a provision in the order that detained mail may be opened to examination by the Defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity.

/s/ William F. Lawrence  
WILLIAM F. LAWRENCE  
Assistant General Counsel  
Mailability Division

Subscribed and sworn to before me this 6th day of June, 1969.

/s/ Lawrence B. Gowen  
Notary Public

My commission expires May 14, 1971

POST OFFICE DEPARTMENT  
WASHINGTON, DC 20206

P.O.D. Docket 3/23

In the Matter of the Complaint Against  
THE BOOK BIN at 123 Simpson Street, N. W.  
Atlanta, Georgia 30313

COMPLAINT

The undersigned, Assistant General Counsel, Mailability Division, Post Office Department, has probable cause to believe, and therefore alleges that, under the name set forth in the caption hereof (hereinafter called the Respondent), there is being conducted through the mails an enterprise in violation of Section 4006, Title 39 U. S. Code, and in support of that belief alleges as follows:

(1) That the Respondent is now, and for some time heretofore, has been obtaining and attempting to obtain remittances of money through the mails for obscene, lewd, lascivious, indecent, filthy or vile articles, namely a certain magazine;

(2) That the Respondent is depositing or causing to be deposited in the United States mails circular matter giving information as to where, how, or from whom articles of an obscene, lewd, lascivious, indecent, filthy or vile nature may be obtained;

(3) That attached hereto as Exhibit "A" is a true copy of the said circular matter mentioned in the item next above;

(4) That to persons remitting to Respondent the sums of money stated in the aforesaid advertisement and solicitation, the Respondent sends articles, among them the following magazine which is of an obscene, lewd, lascivious, indecent, filthy or vile nature:

"MODELS DE FRANCE"

(5) That Respondent is using the mails for the conduct of an enterprise whereby it conveys obscene, lewd, lascivious, indecent, filthy or vile articles to all those who make appropriate remittances of money therefor.

WHEREFORE, it is requested that an appropriate order issue to the appropriate postmasters to dispose of all mail addressed for delivery to, and money orders drawn in favor of, THE BOOK BIN, or agents or representatives of such, in accordance with the provisions of said Title 39, U. S. Code, Section 4006.

/s/ W. F. Lawrence  
WILLIAM F. LAWRENCE  
Assistant General Counsel  
Mailability Division  
COMPLAINANT

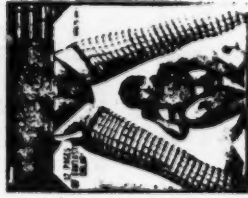


# **FINE PENDULUM MAGAZINES FOR THE CONNOISSEUR**

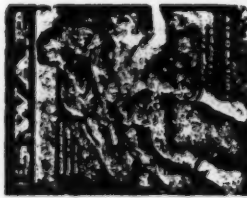
The Book Bin is proud to bring you, for the FIRST TIME, an excellent selection of newly-published magazines never before offered by mail. Many are published by Pendulum - and have the same high quality you have come to expect in Pendulum paperbacks. Supplies are limited of these fast-moving titles, so order now!



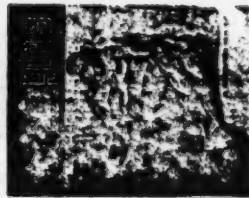
**M-1 Roulette**  
Vol. 2, #4 \$3.00



**M-6 Lezo**  
Vol. 2, #5 \$3.00



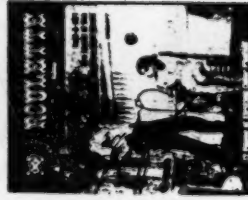
**M-11 Swap**  
Vol. 2, #4 \$3.00



**M-16 Carter Girls**  
Vol. 2, #3 \$2.50



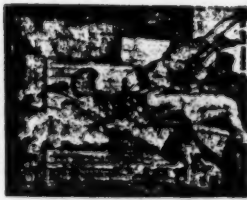
**M-21 Blazing Films**  
Vol. 2, #4 \$2.00



**M-2 Roulette**  
Vol. 2, #5 \$3.00



**M-7 Lezo**  
Vol. 2, #3 \$3.00



**M-12 Swap**  
Vol. 2, #5 \$3.00



**M-17 Carter Girls**  
Vol. 2, #4 \$2.50



**M-22 Blazing Films**  
Vol. 2, #5 \$2.00



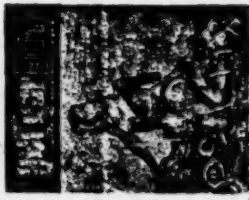
**M-3 Body & Soul**  
Vol. 1, #1 \$2.50



**M-8 The Wild Cats**  
Vol. 2, #4 \$3.00



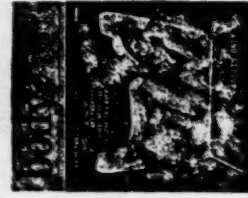
**M-13 Dynamic Films**  
Vol. 2, #5 \$2.00



**M-18 Carter Girls**  
Vol. 2, #5 \$2.50



**M-23 Foxy Lady**  
Number 1, \$5.00



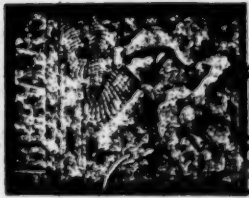
**M-4 Body & Soul**  
Vol. 1, #2 \$2.50



**M-9 The Wild Cats**  
Vol. 2, #5 \$3.00



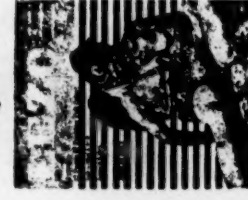
**M-14 Dynamic Films**  
Vol. 2, #3 \$2.00



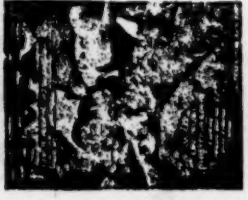
**M-19 Young Beavers**  
Vol. 2, #4 \$2.50



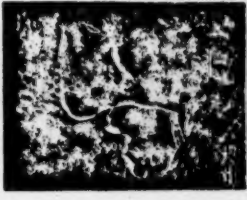
**M-24 Cherry**  
\$5.00



**M-5 Lezo**  
Vol. 2, #4 \$3.00



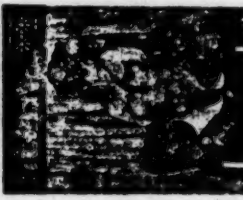
**M-10 Swap**  
Vol. 2, #3 \$3.00



**M-15 Dynamic Films**  
Vol. 2, #4 \$2.00



**M-20 Young Beavers**  
Vol. 2, #5 \$2.50



**M-25 Helena**  
\$5.00

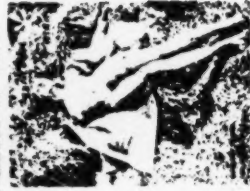
EXHIBIT A

58a





M-26 Model Parade  
Number 1, \$5.00



M-31 Model Parade  
Only \$2.50



M-27 Fabulous  
Only \$5.00



M-32 Miss Lesbo  
Number 1, \$5.00



M-28 Models de France  
Only \$3.50



M-33 Living Dolls  
Vol. 1, \$5.00



M-29 Models d'Italia  
Only \$3.50



M-34 Modern Women  
Vol. 1, \$5.00



M-30 Figure View  
Only \$2.50



M-35 Fantastic  
Only \$5.00

#### ILLUSTRATED PENDULUM PICTORIAL PAPERBACKS

Each volume contains 80 actual photographs of young and attractive men and women in thrill-packed action!



Bye Bye Broadie  
PP001 \$1.75



Raped in the Grass  
PP002 \$1.75



The Erotic Spy  
PP003 \$1.75



Prison Passion  
PP004 \$1.75



Nazi Field Whores  
PP005 \$1.75



Svengali of Sex  
PP006 \$1.75

Please order by catalogue number

## THE BOOK BIN

123 SIMPSON STREET, N.W.

ATLANTA, GEORGIA 30313

no C.O.D.'s, no stamps

Please send me the following books: (Please use catalogue numbers)

_____	Magazines @ \$2.00 = \$ _____
_____	Magazines @ \$2.50 = \$ _____
_____	Magazines @ \$3.00 = \$ _____
_____	Magazines @ \$3.50 = \$ _____
_____	Magazines @ \$5.00 = \$ _____
_____	Books @ \$1.75 = \$ _____
_____	TOTAL \$ _____

Name \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State \_\_\_\_\_

Zip \_\_\_\_\_

NOTE: Orders containing cash or money orders are shipped immediately.

We hold check orders until check has cleared.

POST OFFICE DEPARTMENT  
WASHINGTON, DC 20206

P.O.D. Docket 3/23

In the Matter of the Complaint Against  
THE BOOK BIN at 123 Simpson Street, N. W.  
Atlanta, Georgia 30313

MOTION FOR EXPEDITED PROCEEDING

In a complaint concurrently filed herewith, The Book Bin (Respondent) is charged with violation of 39 U. S. Code 4006. Complainant files this motion pursuant to Section 952.17(a) of the Rules of Practice for an expedited hearing to be presided over by the Judicial Officer for the following reasons:

1. Elimination of intermediate procedural steps will be of advantage to both parties and better serve the interests of the public. If, as the Complainant has probable cause to believe, the Respondent has been, and is, engaging in the activities which formed the basis for the Complaint and has been receiving remittances therefor, it is imperative in the public interest that such activities be curbed as quickly as possible. If the Respondent's activities do not form the basis for appropriate order directed against such activities, then it should be in the interest of the Respondent to proceed expeditiously.
2. Based on information and belief, the Respondent continues to engage in the activities complained against and continues to seek and obtain remittances in the mail.
3. Complaints continue to be received concerning the activities of the Respondent which form the basis of the Complaint.
4. Because of the seriousness of the issues and related matters, it is believed that, ultimately, the Judicial Officer will be called upon to review the record and perhaps be required to review and act on other procedural matters which, under the expedited procedure requested herein, could be disposed of during the hearing and immediately processed without further appeal.

WHEREFORE, it is requested that on the basis of the foregoing, and for good cause shown, the Judicial Officer preside at the Hearing of the captioned proceeding and that said Hearing be scheduled for an early date agreeable to all parties concerned herein.

DAVID A. NELSON  
General Counsel

/s/ W. F. Lawrence  
By: WILLIAM F. LAWRENCE  
Assistant General Counsel  
Mailability Division

/s/ Jerry P. McKinnon  
JERRY P. MCKINNON  
Trial Attorney

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY  
Northern District of Georgia  
402 Old Post Office Bldg.  
P. O. Box 912  
Atlanta, Georgia 30301

June 12, 1969

The Book Bin  
123 Simpson Street, N.W.  
Atlanta, Georgia 30313

12812

Gentlemen:

Enclosed is a Complaint for Temporary Restraining Order and Preliminary Injunction which we have filed with the Clerk of the United States District Court for the Northern District of Georgia.

Please be advised that we will present to Judge Newell Edenfield a proposed Temporary Restraining Order for his consideration on Monday, June 16, 1969, at 4:30 P.M. in his chambers, Third Floor, Old Post Office Building, Atlanta, Georgia. We will also ask Judge Edenfield to set a date for a hearing on our motion for a preliminary injunction.

Yours very truly,

JOHN W. STOKES, JR.  
United States Attorney

/s/ Charles B. Lewis, Jr.  
By: CHARLES B. LEWIS, JR.  
Assistant U. S. Attorney

Encl.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption Omitted]

DEFENDANT'S MOTION TO DISMISS COMPLAINTS FOR  
TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION

[Filed June 17, 1969]

TO THE HONORABLE, THE JUDGE OF SAID  
COURT:

The Book Bin, Inc., a body corporate of the State of Georgia, by and through its attorneys, High Gibert, Esquire and Robert Eugene Smith, Esquire, of Counsel moves to dismiss the Complaint for Temporary Restraining Order and Preliminary Injunction filed by the United States Attorney for the Northern District of Georgia, on behalf of the United States of America and the Postmaster General as Plaintiffs, for any one or all of the following reasons:

1. "MODEL DE FRANCE", the magazine publication sought to be suppressed via the Post Office Department's proceedings, is not obscene as a matter of law in the constitutional sense, nor is there any "probable cause" to believe that the said magazine is obscene under Federal Constitutional standards.

2. Plaintiff's Complaint praying a temporary restraining order fails to establish by the recitation of specific facts, shown by affidavit or verified Complaint, that immediate and irreparable injury, loss or damage will result to Plaintiff's or any substantial subordinating interest represented by Plaintiffs, and Defendant affirmatively avers that no immediate and irreparable injury, loss or damage will result to Plaintiffs by denial of the Temporary Restraining Order.

3. That any Temporary Restraining Order or Preliminary Injunction as prayed for by Plaintiffs will operate as a constitutionally prohibited "prior restraint" on

the exercise of Defendant's *First Amendment* rights to distribute printed matter, and will have a substantial "chilling effect" on Defendant's right to sell and distribute presumptively protected printed matter, and

4. That the Act of Congress under which Plaintiffs are proceeding to obtain an interim impounding order from this Court, codified at *Title 39, U.S.C.A., Section 4007*, is unconstitutional as written and/or as applied, or in its threatened application by the Postmaster General of the United States, his agents, servants, employees and attorneys and others under his direction and control, and is repugnant to the *First, Fourth and Fifth Amendments to the Constitution of the United States* on each and any one of the following basis:

A) The said statutory provisions permit an *ex parte* temporary restraining order to be entered by the United States District Court on application by the Postmaster General requiring only "probable cause" before suppression of presumptively protected *First Amendment* materials, and

B) The exception created under Subsection (B) of said statutory provision relative to exempting publishers of publications which have entry as Second Class Matter or agents of any such publishers is without foundation and deprivation of Counterclaimant's constitutionally mandated right to equality under the law.

C) Said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of federal constitutional rights of the citizens of the United States who desire to purchase and receive such publications, as well as of Counterclaimant to distribute, circulate and/or sell said publications; and further,

D) Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth*

*Amendment to the United States Constitution* because they permit deprivation of liberty and/or property interest for the exercise of *First Amendment* rights by unreasonable, arbitrary and capricious means on the part of the Postmaster General, his agents, servants, and employees, without a showing of a real and substantial relationship to any subordinating interest which is compelling to justify federal action limiting *First Amendment* freedoms; and further,

E) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth Amendment to the Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the *First Amendment* to which it is entitled; and further,

F) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth, and Fifth Amendments to the Constitution of the United States* in that said statutory provisions permit inherent powers of censorship, suppression, and prior restraint by the Postmaster General of the United States, his agents, servants, employees, attorneys and other under his direction and control; and further,

G) Said statutory provisions are repugnant to the *First and Fifth Amendments to the Constitution of the United States* in that they fail to provide for any determination of mental element requisite to a constitutionally permissible suppression of alleged obscene materials.

5. That the Act of Congress on which Plaintiffs beased their *Complaint for Temporary Restraining Order and Preliminary Injunction*, codified under Title 39, U.S.C.A., Section 4006, entitled "‘Unlawful’ Matter", is unconstitutional as written and repugnant to the *First, Fourth and Fifth Amendments to the Constitution of the United States* for each and any one of the following basis.



A) Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such are repugnant to the Due Process provisions of the *Fifth Amendment* to the *Constitution of the United States*; and further,

B) Said statutory provisions are void by overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth standards for determining and regulating obscenity at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in connection with publications presumptively protected under the *First Amendment*; and further,

C) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth and Fifth Amendments to the Constitution of the United States* in that said statutory provisions permit inherent powers of censorship, suppression, and prior restraint by the Postmaster General of the United States, his agents, servants, employees, attorneys and others under his direction and control; and further,

D) Said statutory provisions are repugnant to the *First and Fifth Amendments to the Constitution of the United States* in that they fail to provide for any determination of mental element requisite to a constitutionally permissible suppression of alleged obscene materials.

6. That the Act of Congress under which Plaintiffs are proceeding to obtain an interim impounding order from this Court, codified at *Title 39, U.S.C.A. Section 4006*, entitled, " 'Unlawful' Matter" is unconstitutional as applied and in its threatened application by the Postmaster General of the United States of America, his agents, servants, employees, attorneys, and others under his direction and control, and repugnant to the *First*,



Fourth and Fifth Amendment to the Constitution of the United States of America, for each and any one of the following basis;

A) The procedures as applied in the context of the protections for free speech and press secured under the *First Amendment* by the Postmaster General, his agents, servants, employees and attorneys, permit a suppression of presumptively protected printed matter without a prior judicially superintended adversary hearing for the purpose of determining whether said presumptively protected printed matter is obscene as a matter of law in the constitutional sense; thus depriving said Counter-claimant of rights under the *First and Fifth Amendments* to the *Constitution of the United States*; and said procedures as applied and as threatened to be applied *in futuro* under color of enforcement of said statutory provisions against Counterclaimant, fail to insure against the curtailment of constitutionally protected expression, and as such are void for impermissible overbreadth, and

B) The procedures as applied herein in the context of the constitutional protections afforded for free speech and press, by the Postmaster General, his agents, servants and employees under the referenced statutory provisions, have the effect and threaten to have the effect of inhibiting the protected expression and abridging the right of the public to unrestricted circulation of presumptively protected non-obscene publications, as well as the right of Counterclaimant to circulate and distribute such said publications on which there has been no final judicial determination of obscenity before suppression, and as such the statute as applied is void for impermissible overbreadth by means which sweep unnecessarily broadly and stifle fundamental rights and liberties afforded Counterclaimant and interested citizens of the United States, when the end can be more narrowly achieved under less drastic provisions to serve a constitutionally proper federal governmental interest, and

C) The procedures as applied under the referenced statutory provisions by the Postmaster General of the United States, his agents, servants, employees and attorneys, and others under his direction and control, involve the use of terminology and standards by them under color of enforcement of the said statutory provisions which forbid or attempt to forbid Counterclaimant from the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, and hence said provisions are constitutionally deficient and void for vagueness, and

D) The application of the referenced statute by the Postmaster General of the United States involves the use by him, his agents, servants, employees and attorneys and others under his direction and control of a statute which contains no element of "scienter" and unconstitutionally deprives Counterclaimant from the exercise of its *First Amendment* rights, without the constitutionally mandated requirement that Counterclaimant have the requisite "guilty knowledge", and

E) The Postmaster General of the United States, his agents, servants, employees and attorneys, and others under his direction and control, in the application of said statute have acted in an arbitrary, capricious and unreasonable manner in attempting to enforce said statutory provisions and said arbitrary, capricious and unreasonable actions are and were repugnant to the Counterclaimant's constitutional rights under the *First and Fifth Amendments* to the *Constitution of the United States*.

7. That notwithstanding the patent unconstitutionality of *Title 39, U.S.C.A., Section 4006*, and the application of *Title 39, U.S.C.A. Section 4007*, in the context of the constitutional protections afforded free speech and press, there is further patent unconstitutionality in that after the full and complete hearing being requested by the Office of the General Counsel for the Post Office Department and final decision rendered by the judicial hearing

officer, the burden of going forward in instituting appellate judicial review falls on the person who seeks to exercise his *First Amendment* rights and this burden is repugnant to the *First and Fifth Amendments* to the *Constitution of the United States* and contrary to the teachings of *Freedman vs. Maryland*, 380 U.S. 51 at Page 60; further,

The statue and the rules and regulations implemented thereunder, do not provide by its terms, any assurance as to the time period within the administrative hearing must be held after issue is joined or a specified brief time period within which the Post Office Department Judicial Hearing Officer must rendered his decision; nor is there any statutory provision or departmental rule or regulation specifying the time within which the Exceptions to Initial Decision or Tentative Decision that may be taken must be considered and resolved. Further, there is no statutory assurance or rule or regulation that specifies the time within which the Final Post Office Department Decision must be rendered or a Motion for Reconsideration resolved. The failure of the Statute and/or rules and regulations implemented thereunder is contrary to the teaching of *Freedman vs. Maryland* 380 U.S. 51 and *Teitel Film Corp. vs. Cusack* 19 L ed 2d 966 at 969. and accordingly the said statute is further repugnant to the *First, Fourth and Fifth Amendments* to the Constitution of the United States and operates as a constitutionally prohibited "prior restraint".

8. That Plaintiffs knew, or should have known that on June 12, 1969, the date of the filing of the Complaint for Temporary Restraining Order or shortly thereafter, that the Act of Congress, codified at *Title 39, U.S.C.A., Section 4006*, was declared to be unconstitutional as written, in the United States District Court for the Central District of California, by a Three Judge tribunal, in a case styled:

Tony Rizzi, t/a The Mail Box

VS

Winton M. Blount, as Postmaster General  
of the United States, et al.

Civil Action No. 69-64R

Said Act of Congress, declared by the said United States District Court Three Judge panel to be repugnant to the Constitution of the United States, is the very same statute and employing the same procedures, that Plaintiffs seek to invoke in their present *Complaint for Temporary Restraining Order and Preliminary Injunction*, in the case at bar.

A copy of the decision of the United States District Court for the Central District of California will be furnished this Court upon their receipt and attached hereto as *Defendant's Exhibit A*, in support of it's Motion to Dismiss and the contents thereof is incorporated herein by reference.

Wherefore, Defendant prays that the relief prayed in the Complaint for Temporary Restraining Order and Preliminary Injunction filed in this Court by the United States Attorney for the Northern District of Georgia, on behalf of the United States of America and the Postmaster General be denied and the Complaint itself be dismissed.

Respectfully submitted:

/s/ Hugh Gibert  
 HUGH W. GIBERT  
 Suite 2709, First National  
 Bank Bld.  
 Atlanta, Georgia, 30303  
 Attorney for Counterclaimant

/s/ Robert Eugene Smith  
 ROBERT EUGENE SMITH  
 Suite 507, The Alex Brown & Sons Bldg.  
 102 West Pennsylvania Avenue,  
 Towson, Maryland, 21204  
 Area Code (301) 821-6868  
 Of Counsel for Counterclaimant

**CERTIFICATE OF SERVICE****COUNTY OF FULTON:****STATE OF GEORGIA:**

A copy of Counterclaimant's Motion to Dismiss Complaint for Temporary Restraining Order and Preliminary Injunction, has been personally served this 17th day of June, A.D. 1969, by the undersigned, on the Office of the United States Attorney for the Northern District of Georgia, 402 Old Post Office Building, Atlanta, Georgia, 30301, Attorney's for Plaintiffs, the United States of America and the Postmaster General of the United States; to the attention of Charles B. Lewis, Jr., Esquire, Assistant United States Attorney.

/s/ Robert Eugene Smith  
ROBERT EUGENE SMITH  
Of counsel to  
The Book Bin, Inc.  
Counterclaimant

Sworn to and Subscribed Before Me the Undersigned, a Notary Public in and for the County and State Aforesaid, This 17th Day of June A.D., 1969.

/s/ Alice J. Saxe  
Notary Public,  
Georgia, State at Large  
My Commission Expires  
April 27, 1973

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

Civil Docket # 12812

THE UNITED STATES OF AMERICA  
and THE POSTMASTER GENERAL

vs

THE BOOK BIN, INC., DEFENDANT

THE BOOK BIN, INC., COUNTERCLAIMANT

vs

THE HONORABLE WINTON M. BLOUNT, Postmaster General of the United States of America and THE UNITED STATES OF AMERICA, DEFENDANTS

I. MOTION FOR INTERLOCUTORY INJUNCTION

[Filed June 17, 1969]

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The Book Bin, Inc., counterclaimant, by and through it's attorneys, Hugh Gibert, Esquire and Robert Eugene Smith, Esquire, of counsel, moves the Court under the provisions of *Rule 65* of the *Federal Rules of Civil Procedure* for a *Interlocutory Injunction*, restraining and enjoining, the Postmaster General, his agents, servants, employees, attorneys and any and all other persons acting under his direction and control, and each of them, and persons in active concert with them, from continuing the following unconstitutional and unlawful acts, to wit:

A) Instituting and/or docketing further proceedings against Counterclaimant under color of enforcement of *Title 39 U.S.C.A. Section 4006* to suppress the sale or circularization of magazines, books, pictures, and other presumptively protected *First Amendment* materials, pending final hearing and de-

termination by the Court of the Counterclaimant's application for a Permanent Injunction and Declaratory Judgment; and;

B) From further proceeding in any manner whatsoever in the present Complaint before the Post Office Department in the case styled:

"In the Matter of the Complaint Against:

### THE BOOK BIN"

carried as P.O.D. Docket 3/23, now scheduled for expedited hearing at the request of the Assistant General Counsel, Mailability Division, before Peter R. Rosenblatt, Post Office Department Judicial Officer, on July 8, 1969, at 10:00 A.M.; pending final hearing and determination by the Court of the Counterclaimant's application for a Permanent Injunction and Declaratory Judgment.

II. Unless the Postmaster General of the United States, his agents, servants, employees, attorneys and any and all other persons acting under his direction and control, and each of them, and persons in active concert with them are so enjoined and restrained, immediate and irreparable harm will result to Counterclaimant by the deprivation and threatened deprivation of the exercise of said Counterclaimant's rights secured to it by the *First, Fourth and Fifth Amendments to the Constitution of the United States* as more particularly described in the *Counterclaimant's Petition for Interlocutory and Permanent Injunction and Application for Three-Judge Court* and exhibits attached and filed therewith.

Further, the danger of irreparable harm is all the more patent because of the grossly unconstitutional standards and procedures employed under the Acts of Congress codified at *Title 39, U.S.C.A., Sections 4006 and 4007*. The actions of the Postmaster General, his agents, servants, employees, attorneys, and others acting under his direction and control and each of them, and persons in active concert with them, have and threaten to have a "chilling effect" on the exercise of Counterclaimant's

*First Amendment* rights as well as on the exercise of the *First Amendment* Rights of other similarly situate.

The factual allegations of the Counterclaimant's *Petition for Interlocutory Permanent Injunction and Application for Three-Judge Court*, considered together with the publication, "Models de France", which is not obscene as a matter of law in the constitutional sense, make it patently clear that the Postmaster General, his agents, servants, employees and attorneys are enforcing and attempting to enforce the Acts of Congress, codified as *Title 39, U.S.C.A., Sections 4006 and 4007*, the constitutionality of which are more than merely suspect, in a patently unconstitutional manner and by the exercise of arbitrary, capricious and virtually unbridled discretion, all to the immediate and irreparable harm of the Counterclaimant.

Respectfully submitted:

/s/ Hugh Gibert  
HUGH W. GIBERT  
Suite 2709, First National  
Bank Building  
Atlanta, Georgia, 30303  
Attorney for Counterclaimant  
The Book Bin, Inc.

By: /s/ R. D. Underhill  
R. D. UNDERHILL  
Vice President  
Counterclaimant

/s/ Robert Eugene Smith  
ROBERT EUGENE SMITH  
Suite 507  
The Alex. Brown & Sons Bldg.  
102 West Pennsylvania Avenue,  
Towson, Maryland 21204  
Area Code (301) 821-6868  
Of Counsel for Counterclaimant



## CERTIFICATE OF SERVICE

COUNTY OF FULTON:

STATE OF GEORGIA:

A copy of Counterclaimant's Motion for Interlocutory Injunction, has been personally served this 17th day of June, A.D. 1969, by the undersigned, on the Office of the United States Attorney for the Northern District of Georgia, 402 Old Post Office Building, Atlanta, Georgia, 30301, Attorneys for Plaintiffs, the United States of America and the Postmaster General of the United States; to the attention of Charles B. Lewis, Jr. Esquire, Assistant United States Attorney.

/s/ Robert Eugene Smith  
ROBERT EUGENE SMITH  
Of counsel to  
The Book Bin, Inc.  
Counterclaimant

Sworn to and Subscribed Before Me the Undersigned, a Notary Public in and for the County and State Aforesaid, This 17th Day of June A.D., 1969.

/s/ Alice J. Saxe  
Notary Public,  
Georgia, State at Large  
My Commission Expires  
April 27, 1973

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption Omitted]

COUNTERCLAIMANT'S PETITION FOR INTERLOCUTORY AND  
PERMANENT INJUNCTION AND APPLICATION FOR  
THREE-JUDGE COURT

[Filed June 17, 1969]

TO THE HONORABLE, THE JUDGES OF  
SAID COURT:

The Book Bin, Inc., a body corporate of the State of Georgia, as Counterclaimant by and through its attorneys, Hugh Gibert, Esquire, of counsel, by their counterclaim for cause of action represent to the Court as follows:

*Jurisdiction*

I. Jurisdiction whereby Counterclaimant prays an interlocutory and permanent injunction issue to restrain the enforcement of Title 39, U.S.C.A. Sections 4006 and 4007 because the same are unconstitutional as written, and/or in the alternative, to restrain the enforcement of Title 39, U.S.C.A., Sections 4006 and 4007 because said statutes are unconstitutional as applied in their threatened application to Counterclaimant in the case at bar. The allegations presented questions of actual controversy between the parties involving substantial constitutional issues.

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional issues herein presented by Title 28, U.S.C.A. Section 1339 which provides in pertinent part:

"The District Courts shall have original jurisdiction of any civil action arising under any act of Congress relating to the postal service"

as well as *Title 28, U.S.C.A., Section 1331A* and *Article III, Section 2* of the *Constitution of the United States*.

3. Counterclaimant applies to have a Three-Judge Court convened under the provisions and procedures authorized by *Title 28, U.S.C.A. Sections 2282 and 2284*.

4. Prayer for declaratory relief is founded on *Rule 57* of the *Federal Rules of Civil Procedure* as well as *Title 28, U.S.C.A., Section 2201* which provides in pertinent part:

"... any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . ."

5. The matters in controversy exceed the value of Ten Thousand Dollars (\$10,000.00) as will be more fully set out herein.

6. The Clerk is directed to give notice by registered or certified mail to The Honorable John Mitchell, Attorney General of the United States of America, and to The Honorable John W. Stokes, United States Attorney for the Northern District of Georgia, as is required under *Title 28, U.S.C.A., Section 2284, Subsection 2*.

## II. Parties

7. The Book Bin, Inc., is a body corporate of the State of Georgia engaged in the sale, distribution and offering for sale of nudist magazines and male and female nude photo art publications, books and other presumptively protected First Amendment materials from its address at 267 Marietta Street, N.W., Atlanta, Georgia 30313 and Counterclaimant has been so engaged for all times relevant hereto.

8. The Honorable Winton M. Blount is named as a Defendant in his capacity as Postmaster General of the United States of America who has the responsibility for the supervision of the administration and institution of any actions under the postal laws of the United States of America including *Title 39, U.S.C.A., Sections 4006 and 4007*.

### III. *Factual Allegations*

9. On or about June 10, 1969, there was served on the Counterclaimant a complaint instituted by the Assistant General Counsel, Mailability Division, Post Office Department, under *Title 39, U.S.C.A., Section 4006* styled "In Matter of the Complaint Against THE BOOK BIN at 123 Simpson Street, N.W., Atlanta, Georgia 30313, carried as P.O.D. Docket No. 3/23, together with a Motion for Expedited Proceeding, copy of the Order granting an expedited proceeding, and Notice of Hearing date for July 8, 1969. In addition, Counterclaimant was furnished with a copy of the magazine charged to be "obscene, lewd, lascivious, indecent, filthy or vile", to wit, "Models de France". Copies of all documents with the exception of the magazine are attached hereto collectively as Counterclaimant's *Exhibit A* in support of this complaint and the contents are incorporated herein by reference.

10. It would appear from the Exhibit attached to the complaint that the advertising brochure has been in the custody of the Post Office since February 4, 1969 (see initials and date at top of said brochure attached to the complaint).

11. That on or about Friday, June 13, 1969, there was served on The Book Bin, notice that the representative of the United States Attorney for the Northern District of Georgia would go before the United States District Court for the Northern District of Georgia on Monday, June 16, 1969, at 4:30 in the afternoon and seek to obtain a temporary restraining order against The Book Bin directing the retention of Counterclaimant's incoming mail by the Postmaster pending the conclusion of the statutory proceedings in any appeal therefrom under the statutory provisions of *Title 39, U.S.C.A. Section 4007(A)*.

### IV. *Basis in Law for Relief*

12. The threatened conduct of the representatives of the Postmaster General and his agents, servants, employees, attorneys and others acting under his direction and control in seeking to suppress from the public material presumptively protected under the *First Amendment* to

the *Constitution of the United States* will dissipate the efforts of the Counterclaimant to have said material sold to and/or accepted by citizens of the State of Georgia as well as citizens of the other 49 states of the United States who may personally desire to purchase or receive said materials as is their constitutional right (*Stanley vs. State of Georgia*, 22 L. Ed. 2d 542—1969). The circular matter lists the names of publications without embellishment offering presumptively protected *First Amendment* materials to responsible individuals who make appropriate remittances of money therefor.

13. The conduct of the Postmaster General, his agents, servants, employees, attorneys and others acting under their direction and control in moving to suppress and threatening to suppress the said publication is a "prior restraint" condemned by the *Constitution of the United States*, more particularly the *First, Fourth and Fifth Amendments* thereto.

14. As a further result of the conduct of the Postmaster General, his agents, servants, employees, and attorneys, the Counterclaimant has been intimidated in its trade or business and will suffer loss of profits as well as substantial inference with Counterclaimant's advantageous business relations.

15. As a further result of the unconstitutional conduct of the Postmaster General, his agents, servants, employees and attorneys as aforesaid, Counterclaimant has been required to retain attorneys to defend Counterclaimant from the threatened actions of the Postmaster General, his agents, servants, employees and attorneys.

16. Counterclaimant has the right to engage in the business of offering for sale or profit, non-obscene magazines and books by authority of the *First Amendment* to the *Constitution of the United States* so long as it is done without engaging in the sort of gross pandering condemned by the Supreme Court of the United States in *Ginzburg vs. United States*, 383 U.S. 462.

17. The statutes, particularly *Title 39, U.S.C.A. Section 4006*, as written confer upon the Postmaster General, his agents, servants, employees and attorneys, virtually unbridled and absolute power to prohibit any use

through the mail by Counterclaimant of circulars offering for sale non-obscene nudist and girlie magazines to interested adult persons and said statute as written is further and invidious prior restraint on the constitutional rights of interested citizens and residents of the 50 states of the United States of America who may desire to purchase said magazines for whatever value it may have to them for either amusement purposes or through the communication of ideas, as well as to the Counterclaimant who desires to exercise its First Amendment rights to offer the same for sale and distribution to the interested public.

18. That the act of Congress catalogued under *Title 39, U.S.C.A. Section 4006* entitled " 'Unlawful' Matter," is unconstitutional on its face and repugnant to the *First, Fourth and Fifth Amendments* to the Constitution for the following reasons:

A) Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such are repugnant to the Due Process provisions of the *Fifth Amendment to the Constitution of the United States*; and further,

B) Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth standards for determining and regulating obscenity at variance with and in sufficient for those minimum standards prescribed by the United States Supreme Court in connection with publications presumptively protected under the *First Amendment*; and further,

C) Said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of federal constitutional rights of the citizens of the

United States who desire to purchase and receive such publications, as well as of Counterclaimant to distribute, circulate and/or sell said publications; and further,

D) Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth Amendment* to the *United States Constitution* because they permit deprivation of liberty and/or property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary and capricious means on the part of the Postmaster General, his agents, servants and employees, without a showing of a real and substantial relationship to any subordinating interest which is compelling to justify federal action limiting *First Amendment* freedoms; and further,

E) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth Amendment* to the *Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the *First Amendment* to which it is entitled; and further,

F) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth and Fifth Amendments* to the *Constitution of the United States* in that said statutory provisions permit inherent powers of censorship, suppression, and prior restraint by the Postmaster General of the United States, his agents, servants, employees, attorneys and others under his direction and control; and further,

G) Said statutory provisions are repugnant to the *First and Fifth Amendments* of the *Constitution of the United States* in that they fail to provide for any determination of mental element requisite to a constitutionally permissible suppression of alleged obscene materials.

19. That the act of Congress as codified under *Title 39, U.S.C.A. Section 4006* entitled " 'Unlawful' Matter"



is unconstitutional as applied and in its threatened application by the Postmaster General of the United States of America, his agents, servants, employees, attorneys and others under his direction and control, and is repugnant to the *First, Fourth and Fifth Amendments* to the *Constitution of the United States of America*, in that:

A) The procedures as applied in the context of the protections for free speech and press secured under the *First Amendment* by the Postmaster General, his agents, servants, employees and attorneys, permit a suppression of presumptively protected printed matter without a prior judicially superintended adversary hearing for the purpose of determining whether said presumptively protected printed matter is obscene as a matter of law in the constitutional sense; thus depriving said Counterclaimant of rights under the *First and Fifth Amendments* to the *Constitution of the United States*; and said procedures as applied and as threatened to be applied *in futuro* under color of enforcement of said statutory provisions against Counterclaimant, fail to insure against the curtailment of constitutionally protected expression, and as such are void for impermissible overbreadth, and

B) The procedures as applied herein in the context of the constitutional protections afforded for free speech and press, and by the Postmaster General, his agents, servants and employees under the referenced statutory provisions, have the effect and threaten to have the effect of inhibiting the protected expression and abridging the right of the public to unrestricted circulation of presumptively protected non-obscene publications, as well as the right of Counterclaimant to circulate and distribute said publications on which there has been no final judicial determination of obscenity before suppression, and as such the statute as applied is void for impermissible overbreadth by means which sweep unnecessarily broadly and stifle fundamental rights and liberties afforded Counterclaimant and interested citizens of the United States, when the end can be more narrowly achieved under less drastic provi-



sions to serve a constitutionally proper federal government interest, and

C) The procedures as applied under the referenced statutory provisions by the Postmaster General of the United States, his agents, servants, employees and attorneys, and others under his direction and control, involve the use of terminology and standards by them under color of enforcement of the said statutory provisions which forbid or attempt to forbid Counterclaimant from the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, and hence said provisions are constitutionally deficient and void for vagueness, and

D) The application of the referenced statute by the Postmaster General of the United States involves the use by him, his agents, servants, employees and attorneys and others under his direction and control of a statute which contains no element of "scienter" and unconstitutionally deprives Counterclaimant from the exercise of its *First Amendment* rights, without the constitutionally mandated requirement that Counterclaimant have the requisite "guilty knowledge", and

E) The Postmaster General of the United States, his agents, servants, employees and attorneys, and others under his direction and control, in the application of said statute have acted in an arbitrary, capricious and unreasonable manner in attempting to enforce said statutory provisions and said arbitrary, capricious and unreasonable actions are and were repugnant to the Counterclaimant's constitutional rights under the *First* and *Fifth Amendments* to the *Constitution of the United States*.

20. That the act of Congress as codified under *Title 39, U.S.C.A. Section 4007* is unconstitutional as written and as applied or in its threatened application by the Postmaster General of the United States, his agents, servants, employees and attorneys and others under his direction and control, in the case at bar is repugnant to

the *First, Fourth and Fifth Amendments* to the *Constitution of the United States* for each and any of the following reasons:

A) The said statutory provisions permit an *ex parte* temporary restraining order to be entered by the United States District Court on application by the Postmaster General requiring only probable cause before suppression of presumptively protected *First Amendment* materials, and

B) The exception created under said statutory provision is without foundation and deprivation of Counterclaimant's equal rights under the law.

21. That notwithstanding the patent unconstitutionality of *Title 39, U.S.C.A., Section 4006*, and the application of *Title 39, U.S.C.A., Section 4007*, in the context of the constitutional protections afforded free speech and press, there is further patent unconstitutionality in that after the full and complete hearing being requested by the Office of the General Counsel for the Post Office Department and final decision rendered by the judicial hearing officer, the burden of going forward in instituting appellate judicial review falls on the person who seeks to exercise his *First Amendment* rights and that this is repugnant to the *First and Fifth Amendments* to the *Constitution of the United States* and contrary to the teachings of *Freedman vs. Maryland*, 380 U.S. 51 at Page 60.

22. The Postmaster General, his agents, servants, employees, attorneys, and others under his direction or control know or should have known that pictorial representations of female nudes in a photo art magazine comparable to the publication "*Models de France*" have been held not to be obscene by multiple courts in the federal and state judicial system, and further, each of the Defendants know or should have known that the Supreme Court of the United States has ruled on pictorial representations of female nudes and held them not to be obscene in the constitutional sense as a matter of law, on numerous occasions since May 1967, citing as authority therefore, *Redrup vs. New York*, 386 U.S. 767. "*Model de France*" is not obscene as a matter of law in the Constitutional Sense.

23. That Counterclaimant has no plain, speedy or adequate remedy in law to avoid the suppression through administrative fiat by a judicial hearing officer who has already ruled that "the Postal Manual, *Section 821.331 (b)* deprives him of the authority to 'to determine the constitutionality of statutes.'" (See department decision in the matter of the complaint against The Mail Box, Post Office Docket No. 379, a copy of which is attached hereto as Counterclaimant's *Exhibit B* in support of its petition, the contents of which are incorporated herein by reference.

24. That "Models de France", alleged by the Postmaster General's representatives to be obscene, has not been judicially determined to be obscene after a judicially superintended adversary hearing involving Counterclaimant.

#### V. Relief Sought

25. Counterclaimant is entitled to and desires that this Court enter a declaratory judgment on hearing under the provisions of *Title 28, U.S.C.A., Section 2201 and Rule 57 of the Federal Rules of Civil Procedure* declaring the acts of Congress codified in *Title 39, U.S.C.A., Sections 4006 and 4007* to be repugnant to the Constitution of the United States as written on their face, or, in the alternative, unconstitutional as the same have been and are being applied or threatened to be applied to Counterclaimant herein.

26. The Counterclaimant is entitled to and desires that this court issue its interlocutory injunction restraining and enjoining the Postmaster General, his agents, servants, employees and attorneys and any and all other persons acting under his direction and control, and each of them, and persons in active concern or participation with them from continuing the following unconstitutional and unlawful acts, to wit:

A) Instituting and/or docketing further proceedings against Counterclaimant under color of enforcement of *Title 39 U.S.C.A. Section 4006* to suppress the sale or circularization of magazines, books, pictures, and other presumptively protected *First*

*Amendment* materials, pending final hearing and determination by the Court of the Counterclaimant's application for a Permanent Injunction and Declaratory Judgment; and;

B) From further proceeding in any manner whatsoever in the present Complaint before the Post Office Department in the case styled:

"In the Matter of the Complaint Against:

THE BOOK BIN"

carried as P.O.D. Docket 3/23, now scheduled for expedited hearing at the request of the Assistant General Counsel, Mailability Division, before Peter R. Rosenblatt, Post Office Department Judicial Officer, on July 8, 1969, at 10:00 A.M.; pending final hearing and determination by the Courts of the Counterclaimants application for a Permanent Injunction and Declaratory Judgment.

27. Counterclaimant further is entitled to and applies for a permanent injunction restraining the Postmaster General of the United States, his agents, servants, employees and attorneys, and any and all other persons acting under his direction and control, and each of them and persons in active concert or participation with them; from:

A) enforcing or attempting to enforce *Title 39 U.S.C.A. Section 4006 and/or 4007*, on the ground that each statutory provision considered separately, alternately and conjunctively, as written or as the same has been applied and is threatened to be applied to Counterclaimant, is repugnant to the *First, Fourth and Fifth Amendments* to the *Constitution of the United States*; and

B) From further proceeding in any manner whatsoever in the matter now pending before the Post Office Department, *P.O.D. Docket No. 3/23* against Counterclaimant herein, except to move to dismiss the said Complaint therein.

28. That Counterclaimant upon its verified Complaint and Petition for an interlocutory and permanent injunc-

tion restraining the Postmaster General of the United States, his agents, servants, employees, attorneys and any and all other persons acting under his direction and control, from the enforcement, operation or execution of Acts of Congress for repugnance to the Constitution of the United States, either as written and/or in the application thereof to Counterclaimant; makes application for the convocation of a Three Judge Court as required by *Title 28, U.S.C.A. Section 2281*, and requests that the Chief Judge of the United States Court of Appeals for the Fifth Circuit be notified pursuant to *Section 2284 of Title 28, U.S.C.A.*, on the presentation of Petitioner's application as aforesaid, in order that the necessary designation of Judges for said Court may be had for the determination of the substantial constitutional issues presented by this controversy. WHEREFORE, Counterclaimant prays:

1. That interlocutory injunction of this Court issue upon hearing, restraining and enjoining the Postmaster General, his agents, servants, employees and attorneys and any and all other persons acting under his direction and control, and each of them from;

A) Instituting and/or docketing further proceedings against Counterclaimant under color of enforcement of *Title 39 U.S.C.A., Section 4006* to suppress the sale or circularization of magazines, books, pictures, and other presumptively protected *First Amendment* materials, and

B) From further proceeding in any manner whatsoever in the present Complaint before the Post Office Department under *P.O.D. Docket 3/23*, pending final hearing and determination by the Court of the Counterclaimant's application for a Permanent Injunction and Declaratory Judgment; and

2. That the Postmaster General be required to forthwith answer this Complaint in conformance with the rules and practices of this Honorable Court; and

3. That a declaratory judgment be rendered declaring that The Acts of Congress Codified as, *Title 39 U.S.C.A., Sections 4006 and/or 4007* considered separately, alternatively and conjunctively, as written or as the same have been applied and are threatened to be applied, are repugnant to the *Constitution of the United States*:

4. That a Three Judge Court be convened under law and issue it's Permanent injunction restraining and enjoining the Postmaster General, his agents, servants, employees and attorneys and any and all other persons acting under his direction and control, and each of them from:

A) Enforcing or attempting to enforce The Acts of Congress Codified as *Title 39 U.S.C.A., Section 4006 and/or 4007*, on the ground that each statutory provision considered separately, alternatively and conjunctively, as written or as the same have been applied and are threatened to be applied, are repugnant to the Constitution of the United States, and

B) From further proceeding in any manner whatsoever in the matter now pending before the Post Office Department under *P.O.D. Docket No. 3/23* against Counterclaimant herein, except to move to dismiss the said Complaint.

5. That the Clerk of Court give notice, by certified mail, of Counterclaimant's application for Preliminary Injunction, Complaint and Notice of Hearing, to the Honorable, John N. Mitchell, Attorney General of The United States of America, as such notice is required by law; and

6. That Counterclaimant have such other and further relief as may be appropriate under the circumstances of this case.

Respectfully submitted:

/s/ Hugh W. Gibert  
 HUGH W. GIBERT  
 Suite 2709, First National Bank Bldg.  
 Atlanta, Georgia, 30303  
 Attorney for Counterclaimant

/s/ Robert Eugene Smith  
 ROBERT EUGENE SMITH  
 Suite 507—The Alex. Brown & Sons Bldg.  
 102 West Pennsylvania Avenue,  
 Towson, Maryland 21204  
 Area Code (301) 821-6868  
 Of Counsel for Counter Claimant

## AFFIDAVIT

COUNTY OF FULTON           )  
   ) SS:  
 STATE OF GEORGIA           )

Before me, the undersigned, a Notary Public, in and for the County and State aforesaid, this 17th day of June, 1969, did personally appear, R. D. Underhill, an individual known to me, who after being duly sworn, did depose and state that he is the Vice President of the body corporate of the State of Georgia, known as The Book Bin, Inc., and that he is authorized to make oath on behalf of the Corporation, and he affirms that the factual allegations in *Counterclaimant's Petition for Interlocutory and Permanent Injunction and Application for Three-Judge Court*, are true and correct to the best of his information, knowledge and belief.

THE BOOK BIN, INC.

By: /s/ R. D. Underhill  
       R. D. UNDERHILL  
       Vice President  
       Counterclaimant

Sworn to and Subscribed Before Me on the Date and Place First Above Mentioned:

/s/ Alice J. Saxe  
    Notary Public,  
       Georgia, State at Large  
    My Commission Expires  
       April 27, 1973



## CERTIFICATE OF SERVICE

COUNTY OF FULTON:

STATE OF GEORGIA

A copy of Counterclaimant's Petition for Interlocutory and Permanent Injunction and Application for Three-Judge Court, has been personally served this 17th day of June, A.D. 1969, by the undersigner, on the Office of the United States Attorney for the Northern District of Georgia, 402 Old Post Office Building, Atlanta, Georgia, 30301, Attorneys for Plaintiffs, the United States of America and the Postmaster General of the United States; to the attention of Charles B. Lewis, Jr., Esquire, Assistant United States Attorney.

/s/ Robert Eugene Smith  
ROBERT EUGENE SMITH  
Of Counsel to  
The Book Bin, Inc.  
Counterclaimant

Sworn to and Subscribed Before Me the Undersigned,  
a Notary Public in and for the County and State Afore-  
said, This 17th Day of June, A.D. 1969.

/s/ Alice J. Saxe  
Notary Public,  
Georgia, State at Large  
My Commission Expires  
April 27, 1973



UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

Civil Action Number 12,812

UNITED STATES OF AMERICA and  
THE POSTMASTER GENERAL, PLAINTIFFS

vs.

THE BOOK BIN, INC., DEFENDANT

MOTION TO DISMISS DEFENDANT'S "MOTION FOR INTER-  
LOCUTORY INJUNCTION" AND DEFENDANT'S "PETITION  
FOR INTERLOCUTORY AND PERMANENT INJUNCTION  
AND APPLICATION FOR THREE-JUDGE COURT"

[Filed June 23, 1969]

Now comes the United States of America, by and through counsel, and moves to dismiss Defendant's "Motion for Interlocutory Injunction" and "Counterclaimant's Petition for Application for Three-Judge Court". This motion is made on the following grounds:

1.

Although these motions are styled in the nature of a Counterclaimant, they go beyond the scope of the nature of the relief sought in Plaintiff's action. Plaintiff's action is brought under 39 U.S.C. 4007 for a preliminary injunction and temporary restraining order pending a decision in this matter by the Postmaster General. Defendant has attempted to fully respond to Plaintiff's action by his motion to dismiss complaint and temporary restraining order. That motion should be determined on its merits. However, he goes further and seeks to have the Postmaster General enjoined from taking action under 39 U.S.C. 4006. In order to take such action, he should be required to institute a separate civil action and should not be allowed to initiate a completely distinct proceeding under the guise of a counterclaim in this

action. See *Thompson v. United States* (1961) 291 F.2d 67.

## 2.

The Defendant has prematurely sought this relief. No order has been entered against him by the Postmaster General and he is not entitled to injunctive relief prior to the administrative proceedings which are scheduled for July 8, 1969. *Toilet Goods, Inc. v. Gardner* (1967) 387 U.S. 158. Furthermore, Defendant has not shown that he will suffer irreparable harm unless injunctive relief is granted prior to the administrative proceedings. His mail relating to orders and remittances for obscene literature will merely be detained until the Postmaster General has acted. If the Postmaster General renders a decision in his favor, the mail will be delivered to him. See *Sperry and Hutchinson v. Federal Trade Commission*, 256 F. Supp. 136, 141-142; *Myers v. Bethlehem Shipbuilders Corp.* (1938) 303 U.S. 41; *Sinclair Oil Corp. v. Smith*, 293 F. Supp. 1111.

WHEREFORE, the United States prays that Defendant's Motion for Interlocutory Injunction and Defendant's Counterclaim Petition for Interlocutory and Permanent Injunction and Application for Three-Judge Court be dismissed.

/s/ John W. Stokes, Jr.  
JOHN W. STOKES, JR.  
United States Attorney

/s/ Charles B. Lewis, Jr.  
CHARLES B. LEWIS, JR.  
Assistant United States  
Attorney

## CERTIFICATE OF SERVICE

I, Charles B. Lewis, Jr., Assistant United States Attorney, Northern District of Georgia, do hereby certify that I have served a copy of the above and foregoing motion on attorney for Defendant by personally handing same to him.

This 23rd day of June, 1969.

/s/ Charles B. Lewis, Jr.  
CHARLES B. LEWIS, JR.  
Assistant United States  
Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

[[Caption Omitted]]

[[Filed June 23, 1969]]

- (1) Requesting Judge: Honorable FRANK A. HOOPER  
Northern District of Georgia
- (2) District Judge: Honorable NEWELL EDENFIELD  
Northern District of Georgia
- (3) Circuit Judge: Honorable LEWIS R. MORGAN
- (4) Date of Order: June 20, 1969

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

/s/ John R. Brown  
JOHN R. BROWN  
Chief Judge  
Fifth Circuit

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

Civil Action No. 12812

UNITED STATES OF AMERICA and  
THE POSTMASTER GENERAL

*vs.*

THE BOOK BIN

[Filed Sept. 9, 1969]

Before: MORGAN, Circuit Judge, and EDENFIELD and  
HOOPER, District Judges.

EDENFIELD, District Judge:

The issue before this three-judge court is the constitutionality of 39 U.S.C. §§ 4006, 4007, under which the Postmaster General acts to curb the flow of allegedly obscene materials through the mails.

On or about June 10, 1969, a complaint was served on the defendant by a representative of the Postmaster General under 39 U.S.C. § 4006, charging that the magazine "Models of France", distributed by defendant, was obscene. An order granting an expedited proceeding was attached, setting a hearing for July 8, 1969, which has since been postponed indefinitely. On June 13, 1969, the United States notified defendant that a temporary restraining order and preliminary injunction would be sought under 39 U.S.C. § 4007, in the United States District Court for the Northern District of Georgia. Under § 4007, a court, upon a showing of probable cause that the obscenity statute has been violated, may direct the detention of all of a defendant's incoming mail, pending the conclusion of the § 4006 proceedings and any appeal therefrom. By way of answer and counterclaim, defendant has challenged the statutory scheme employed under §§ 4006, 4007. A three-judge court was convened

to consider this constitutional challenge. At oral hearing, the Government recognized the desirability of an immediate determination of the constitutional questions.

Under § 4006:

"Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances or money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representatives, to return the registered letters or other letters or mail to the sender marked 'Unlawful'; and

(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes."

Thus, upon an administrative finding by the Postmaster General that the defendant is sending obscene material through the mail, all of his incoming mail may be marked unlawful and returned to the senders, and the Postmaster General may forbid payment of any money orders or postal notes drawn to his name and likewise return them to the senders.

However, prior to 1956, the Postmaster had no authority to prevent the delivery of mail to the suspected offender during the pendency of the statutory [§ 4006] proceedings. "As a result, the person against whom such a mail block was finally imposed had frequently reaped the harvest from his illegal activity and, mail addressed to one location having been blocked, simply launched a

similar activity at a new address." Senate Report No. 1818, U. S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at 3246.

To remedy this situation, the Postmaster General in 1956 received congressional authority to enter an order permitting the temporary, 20-day, impounding of a defendant's incoming mail pending culmination of statutory proceedings and appeal, if necessary to the enforcement of § 4006. The United States District Court could extend the period of detention upon the petition of the Postmaster General. Because of the hardship imposed by the 20-day limitation, the Post Office Department requested—and a House of Representatives bill granted—a 45-day period of detention of a defendant's incoming mail, after which an extension could be obtained by a United States District Court order. However, in 1960, the Congress adopted a Senate measure which removed the arbitrary time limit on detention pending § 4006 action, by substituting a judicial injunction permitting detention throughout the course of the statutory proceedings under § 4006. The 1960 bill, now § 4007, was designed to insure "court supervision of the exercise of the power to detain mail" coming to the defendant. See, U. S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at 3246; *Manual Enterprises v. Day*, 370 U.S. 478, 512-519 (1962) (Brennan, J., concurring). Section 4007 provides, in pertinent part:

"(a) In preparation for or during the pendency of proceedings under sections 4005 and 4006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postmaster General and upon a showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the de-

defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings."

Section 4007 thus complements § 4006, *see*, 39 C.F.R. § 952.6, and the two sections should be interpreted together. For reasons set out below, we find this statutory scheme violative of the First Amendment to the United States Constitution.

First, under § 4007, the United States can obtain a court order detaining *all* of the incoming mail to the defendant. The breadth of this section goes far beyond merely maintaining the status quo. While the defendant may secure delivery of mail which is clearly "not connected with the alleged unlawful activity", the statute imposes an affirmative obligation upon him to examine the mail and demonstrate its non-connection. This obligation to come from under an overly broad statutory imposition puts an unconstitutional restraint on the defendant's First Amendment rights. Thus, in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Court considered a procedure under which the Postmaster General could withhold communist political propaganda sent to an addressee—as well as similar material sent in the future, if the addressee did not return a card to the post office within 20 days of its receipt. In order to receive the mail, the addressee had to request in writing on the card that it be delivered. This procedure was struck down because, as in the instant action, "[t]he addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect. . . ." *Lamont v. Postmaster General*, *supra*, at 307. Justice Brennan, in a concurrence, recognized that the consequence of inaction by the addressee was not only nondelivery of the material in question, but "a denial of access to like publications which he may desire to receive." 381 U.S. at 309. Like the procedures considered in *Lamont*, § 4007 suffers both from a fatal overbreadth



of reach, in detaining all incoming mail, and from imposition of an unwarranted affirmative obligation on the defendant to remove mail unrelated to the alleged obscenity in question. It disrupts, rather than maintains, the status quo, pending post office action in § 4006.

Second, the procedures established in §§ 4006, 4007, do not pass constitutional muster under the tests established by the Supreme Court of the United States. *Freedman v. Maryland*, 380 U.S. 51 (1965) (per Brennan, J.), establishes the litmus tests by which we should be guided in cases such as this. There the Supreme Court recognized, as it had before, *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), that prior submission of material to agency censorship action was not per se unconstitutional under proper safeguards. To avoid First Amendment problems, the Court required that the procedures impose the burden of proof on the censor to show obscenity, permit restraint prior to judicial review only to preserve the status quo, limit the restraint to the shortest period compatible with sound judicial administration, and assure prompt and complete judicial review. The procedures established under §§ 4006, 4007, fall short of meeting these rigid requirements.

Under these sections, no restraint is generally imposed under § 4006 until a § 4007 judicial order is obtained. However, under § 4007, the court must issue a restraining order merely upon a showing of "probable cause." This judicial determination of probable cause is not binding in any way on the administrative decision in § 4006. Section 4007 specifically provides, "An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings." Indeed, this quoted passage was inserted at the behest of the Postmaster General to "guarantee that counsel for a mailer will not be able to raise successfully a bar to all further administrative proceedings in a case in which the Government failed to prevail on its motion for a preliminary injunction." Letter, Arthur E. Summerfield, Postmaster General, to Senator Olin D. Johnston, Chairman, Senate Committee on Post Office and Civil Service, U. S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at

3249. If a United States District Court fails to find probable cause, as it often will, the Postmaster General could still find a violation of § 4006 and impose the restrictions pursuant to that section, without any prior judicial hearing on obscenity. Moreover, it is doubtful if the limited judicial finding implicit in the grant of a § 4007 finding insulates the procedure from constitutional infirmity, since the court issues its order merely on a finding of probable cause, not an actual determination of obscenity. Thus, the statutory scheme effectively operates as a prior restraint.

While prior restraints are not per se indefensible, they bear a heavy presumption of invalidity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968). This presumptive invalidity is not overcome in the instant case by carefully drawn safeguards. Contrast, *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). The administrative procedures established by regulation under § 4006, see 39 C.F.R. §§ 952.1-952.33, do not provide the procedural safeguards envisioned by *Freedman* and succeeding Supreme Court cases. Thus, in *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968), a 50- to 57-day delay between initiation of administrative procedures and institution of judicial proceedings in a censorship action was found to be violative of First Amendment rights. In *Freedman* itself, a delay of four months in securing initial judicial determination and six months in obtaining final appellate review was condemned. 380 U.S. at 55. Compare, *United States v. One Carton Positive Motion Picture Film*, 247 F.Supp. 450 (S.D.N.Y. 1965), *rev'd. on other grounds*, 367 F.2d 889 (2d Cir. 1966). Under the instant procedures, a hearing date under § 4006 must be provided, "[w]henever practicable . . . within 30 days of the date of the notice" of the hearing. 39 C.F.R. § 952.7. In the instant case a hearing was set four weeks after service of the complaint against the defendant, although it has since been postponed. After an administrative hearing, the Post Office hearing examiner is required only to issue a report with "all due speed." 39 C.F.R. § 952.24. If the

hearing examiner finds against the defendant, an appeal must be taken to exhaust administrative remedies, within 15 days of the examiner's decision. 39 C.F.R. § 952.25. There is no deadline for the decision on administrative appeal. Moreover, 39 C.F.R. § 952.27 provides for the filing of a motion for reconsideration of a final Departmental decision.

During this protracted procedure, all of the defendant's mail may be detained if a § 4007 order has been obtained—with only a judicial decision of probable cause of obscenity. Even if the court failed to find probable cause and did not issue a § 4007 order, the defendant would be dissuaded from soliciting orders and distributing the challenged material, because of the possibility that remittances for the material would be withheld once § 4006 administrative action was complete. This chilling inhibition on First Amendment rights during the pendency of lengthy administrative procedures cannot withstand constitutional assault. An inhibition as well as a prohibition are equally denied to the Government in the First Amendment area. *Lamont v. Postmaster General*, supra, at 309 (Brennan, J., concurring); see, also, *Boyd v. United States*, 116 U.S. 616, 635 (1886).

Moreover, if the final administrative decision is against him, the defendant, under the Administrative Procedure Act, must institute judicial review and has the burden of demonstrating that no substantial evidence exists to support the Postmaster's finding of obscenity. This is too great an imposition of defendant's First Amendment rights. See, especially, *Freedman v. Maryland*, supra, 380 U.S. at 59-60, where such a burden was found unacceptable. Compare *United States v. One Carton*, supra, at 458, where the court upheld the constitutionality of § 305 of the Tariff Act, because, in part, the defendant there did not bear the burden of securing a judicial determination of obscenity; rather the burden was thrust on the Government. See, also, *United States v. Magazine Entitled "Hellenic Sun"*, 253 F.Supp. 498 (D.Md. 1966), *aff'd.*, 373 F.2d 633 (4th Cir. 1967). The application of the Postmaster General here for an injunction under § 4007 does not correct this constitutional flaw in the

instant statutory network. As noted, § 4007 does not permit a full judicial finding on obscenity, but restricts a court to a finding of probable cause. Moreover, even if a court found the material in question non-obscene and failed to issue a § 4007 order, the Postmaster would not be barred from proceeding under § 4006, with the attendant restraints discussed.

Thus, in short, action under § 4006-7 may be taken which goes beyond preservation of the status quo, which fails to assure a prompt administrative decision, and which thrusts the requirement of a judicial determination on the defendant.

Third, contrary to the Government's central argument, the statutes impose a direct restraint on the distribution of the allegedly obscene materials. We reject the Government's argument that its actions are aimed only at remittances, not at distribution of obscene materials. See, *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting); *Stanard v. Olesen*, 74 S.Ct. 768, 771 (1954) (Douglas, J., as Circuit Judge). Any action aimed at remittances received for material will have a direct restraint on distribution of the material itself. A defendant is likely to restrict or end distribution of material as to which a § 4007 order has been obtained, or as to which a § 4006 proceeding is pending. The United States may not accomplish by indirection, through action against remittances, what it cannot do directly. The United States urges that the predecessor to § 4006 has been upheld against constitutional assault by the courts. However, the decisions cited either go off on other grounds or give little if any consideration to the constitutional issue raised. Thus, in *Tourlanes Publishing Co. v. Summerfield*, 231 F.2d 773 (D.C.A. 1956), cert. denied, 352 U.S. 912, cited by the United States, the court specifically stated they were not reaching the "difficult constitutional issues raised" by the cross-appeal, concerning the Postmaster General's refusal to deliver all of Tourlanes' mail. 231 F.2d at 775. *Glanzman v. Finkle*, 150 F.Supp. 823 (E.D.N.Y. 1957), assumes the constitutionality of the predecessor to § 4006, citing *Summerfield v. Sunshine Book Co.*, 211 F.2d 42 (D.C.A.

1954), *cert. denied*, 349 U.S. 921, yet the latter case, also cited by the Government, did not fully consider the constitutional questions, 221 F.2d at 48, but concentrated on the breadth of the Postmaster's order. Moreover, these preceded *Freeman v. Maryland*, *supra*, and many of the other cases imposing strict procedural requirements on Government censorship. See, e.g., *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Poulos v. Rucker*, 288 F.Supp. 305 (M.D.Ala. 1968); *Cambist Films, Inc. v. Tribell*, 293 F.Supp. 407 (E.D.Ky. 1968); *Cambist Films, Inc. v. State of Illinois*, 292 F.Supp. 185 (N.D.Ill. 1968); *Metzger v. Percy*, 393 F.2d 202 (7th Cir. 1968); *Tyrone, Inc. v. Wilkinson*, 294 F.Supp. 1330 (E.D.Va. 1969); *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968). The most recent court to consider § 4006, a three-judge court in *Rizzi v. Blount*, No. 69-64-R, June 10, 1969, C.D. Cal. (per curiam), held it unconstitutional on its face as contrary to *Freedman*, *supra*, and *Lamont*, *supra*. Our discussion here concerning §§ 4006, 4007, supports that court's conclusion.

We understand the concern of Congress and the Post Office to restrict the flow of obscenity through the mails. It may perhaps be true that criminal punishment for mailing obscenity under 18 U.S.C. § 1461 is an inadequate weapon in the Postmaster General's arsenal. However, it is vital that prompt judicial review on the issue of obscenity—rather than merely probable cause—be assured on the Government's initiative before the severe restrictions in §§ 4006, 4007, are invoked.

In the instant case, the defendant can only get full judicial review on the question of obscenity—by which the Postmaster would be actually bound—after lengthy administrative proceedings, and then only by his own initiative. During the interim, the prolonged threat of an adverse administration decision in § 4006 or the reality of a sweeping § 4007 order, will have a severe restriction on the exercise of defendant's first Amendment rights—all without a *final* judicial determination of obscenity. Judicial participation in the finding of obscenity

under the statutory scheme here is either too little (§ 4007) or too late (§ 4006).

The statutory scheme is unconstitutional and we therefore GRANT defendant's motion to dismiss and its counterclaim.

This 8th day of September, 1969.

/s/ Lewis R. Morgan  
LEWIS R. MORGAN  
United States Circuit Judge

/s/ Newell Edenfield  
NEWELL EDENFIELD  
United States District Judge

/s/ Frank A. Hooper  
FRANK A. HOOPER  
United States Senior  
District Judge

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

Civil Action File No. 12812

UNITED STATES OF AMERICA and  
THE POSTMASTER GENERAL

*vs.*

THE BOOK BIN

JUDGMENT

This action came on for hearing before the Court, Honorable Lewis R. Morgan, U. S. Circuit Judge, and Honorable Newell Edenfield and Honorable Frank A. Hooper, United States District Judges, presiding, and the issues having been duly heard and a decision having been duly rendered, granting defendant's motion to dismiss and its counterclaim,

It is Ordered and Adjudged that judgment is hereby entered for the defendant, THE BOOK BIN, and against plaintiffs, UNITED STATES OF AMERICA and THE POSTMASTER GENERAL; and that the defendant recover of the plaintiffs its costs of action.

Dated at Atlanta, Georgia, this 16th day of October, 1969.

CLAUDE L. GOZA  
Clerk of Court

By: /s/ Ruth M. Stilwell  
Deputy Clerk

Filed and entered in Clerk's Office

October 16, 1969

CLAUDE L. GOZA  
Clerk

By: /s/ Ruth M. Stilwell  
Deputy Clerk

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT

[Filed Oct. 16, 1969]

Notice is hereby given that the United States of America, and The Postmaster General, Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on October 16, 1969.

/s/ John W. Stokes, Jr.  
JOHN W. STOKES, JR.  
United States Attorney

/s/ Charles B. Lewis, Jr.  
CHARLES B. LEWIS, JR.  
Assistant United States  
Attorney



**SUPREME COURT OF THE UNITED STATES**

**No. 812, October Term, 1969**

**UNITED STATES, ET AL., APPELLANTS**

**v.**

**THE BOOK BIN**

**APPEAL FROM the United States District Court for the Northern District of Georgia.**

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 788.

**March 2, 1970**